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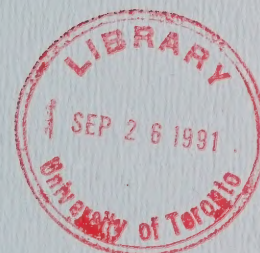
VOLUME: 325

DATE: Wednesday, September 11, 1991

BEFORE:

A. KOVEN Chairman

E. AMRTEL Member



FOR HEARING UPDATES CALL (COLLECT CALLS ACCEPTED) (416)963-1249

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ENVIRONMENTAL ASSESSMENT BOARD

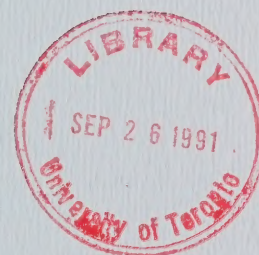
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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER OF a Notice by the
Honourable Jim Bradley, Minister of the
Environment, requiring the Environmental
Assessment Board to hold a hearing with
respect to a Class Environmental
Assessment (No. NR-AA-30) of an
undertaking by the Ministry of Natural
Resources for the activity of timber
management on Crown Lands in Ontario.

Hearing held at the Red Oak Inn, Oak Room C,
555 West Arthur Street, Thunder Bay, Ontario,
on Wednesday, September 11th, 1991, commencing
at 1:30 p.m.

VOLUME 325

BEFORE:

MRS. ANNE KOVEN
MR. ELIE MARTEL

Chairman
Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.)	
MS. C. BLASTORAH)	MINISTRY OF NATURAL
MS. K. MURPHY)	RESOURCES
MR. B. CAMPBELL)	
MS. J. SEABORN)	MINISTRY OF ENVIRONMENT
MS. N. GILLESPIE)	
MR. R. TUER, Q.C.)	
MS. E. CRONK)	ONTARIO FOREST
MR. R. COSMAN)	INDUSTRIES ASSOCIATION
MR P. CASSIDY)	
MR. D. HUNT)	
MR. R. BERAM	ENVIRONMENTAL ASSESSMENT BOARD
MR. E. HANNA)	ONTARIO FEDERATION OF
DR. T. QUINNEY)	ANGLERS & HUNTERS AND
MR. D. HUNTER)	NISHNAWBE-ASKI NATION
MR. M. BAEDER)	and WINDIGO TRIBAL COUNCIL
MS. M. SWENARCHUK)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
MR. D. COLBORNE)	GRAND COUNCIL TREATY
MR. G. KAKEWAY)	#3.
MR. R. IRWIN	ONTARIO METIS & ABORIGINAL ASSOCIATION
MR. J. ANTLE	NORTHERN ONTARIO TOURIST OUTFITTERS ASSOCIATION
MS. M. HALL	KIMBERLY-CLARK OF CANADA LIMITED and SPRUCE FALLS POWER & PAPER COMPANY
MR. R. COTTON	BOISE CASCADE OF CANADA LTD.

APPEARANCES: (Cont'd)

MR. Y. GERVAIS)	ONTARIO TRAPPERS
MR. R. BARNES)	ASSOCIATION
MR. L. GREENSPOON)	NORTHWATCH
MS. B. LLOYD)	
MR. J.W. ERICKSON, Q.C.)		RED LAKE-EAR FALLS
MR. B. BABCOCK)	JOINT MUNICIPAL COMMITTEE
MR. D. SCOTT)	NORTHWESTERN ONTARIO
MR. J.S. TAYLOR)	ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL		GREAT LAKES FOREST
MR. S.M. MAKUCH		CANADIAN PACIFIC FOREST PRODUCTS LTD.
MR. D. CURTIS)	ONTARIO PROFESSIONAL
MR. J. EBBS)	FORESTERS ASSOCIATION
MR. D. KING		VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. H. GRAHAM		CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN		DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC		MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES		ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI		BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY

APPEARANCES: (Cont'd)

MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON
MR. C. BRUNETTA	NORTHWESTERN ONTARIO TOURISM ASSOCIATION

I N D E X O F P R O C E E D I N G S

<u>Witness:</u>	<u>Page No.</u>
<u>BRAD MORSE; Sworn</u>	57256
Direct Examination by Mr. Irwin	57256
Cross-Examination by Mr. Hunt	57348

I N D E X O F E X H I B I T S

<u>Exhibit No.</u>	<u>Description</u>	<u>Page No.</u>
1913	OMAA Witness Statement re: evidence of Professor Brad Morse.	57260

1 ---Upon commencing at 1:30 p.m.

2 MADAM CHAIR: Please be seated. Good
3 afternoon.

4 We're here this afternoon to hear the
5 evidence of the Ontario Metis and Aboriginal
6 Association and I'm going to have to ask people to
7 identify themselves.

8 Mr. Irwin?

9 MR. IRWIN: Madam Chairperson, my name is
10 Ronald Irwin for OMAA.

11 MADAM CHAIR: Thank you, Mr. Irwin.

12 The Board understands that Mr. Irwin will
13 be representing OMAA and I believe we have new counsel
14 for the OFIA.

15 MR. HUNT: Yes. My name is Doug Hunt
16 appearing on behalf of the OFIA.

17 MADAM CHAIR: Okay.

18 MR. HUNT: And I'll give you my card as
19 well.

20 MADAM CHAIR: Thank you, Mr. Hunt.

21 Now, Mr. Irwin, before we begin hearing
22 your evidence, I think we should clarify a number of
23 matters so the Board will understand what you intend to
24 do in your case for the next few days.

25 Firstly, we're going to need to know from

1 you how the witness panels you described in your letter
2 of September 6th relate to the four written witness
3 statements that we have reviewed very closely over the
4 last few months.

5 We're also going to want some
6 clarification of a previously proposed witness Panel
7 No. 5 for which leave of the Board has been requested
8 some time ago.

9 And on a final matter we're going to want
10 to talk about future scheduling of the OMAA's case if
11 any should remain after this Friday.

12 You will have some introductory remarks
13 to make to the Board, but we would like you to help our
14 understanding of what you propose to do over the next
15 three days as it relates to the written material that
16 we have gotten from you.

17 MR. IRWIN: Madam Chair, I was here last
18 Tuesday and I have got some knowledge of what happened
19 and I wanted to thank the Board for its indulgence. It
20 was pretty chaotic here with the injunction and the
21 arrests of the 15 people from Beardmore. I thought
22 that considering how bad last week was that this week
23 looks great.

24 As I indicated in one of the letters to
25 the Board, because emotions are running high on the

1 people of Beardmore right now, we're are going to need
2 some time to talk to the Beardmore people and I've
3 talked to them individually, mainly by phone and some
4 of them here today, but we think the Beardmore should
5 be one panel because it's one witness statement and I
6 think it should come in that way. We've had to
7 reshuffle some of the witnesses.

8 You have the statement from Professor
9 Morse, he's our witness for today. We will anticipate
10 that he will be going most of today. He's from the
11 Faculty of Law, University of Ottawa and will be
12 dealing primarily with four things; Section 35 of the
13 Constitution, the duty of the Crown, judicial
14 interpretations and how it affects this particular
15 Board, how judicial interpretations of the Constitution
16 affect this Board.

17 We also will be starting tomorrow with
18 Marge Misek whose witness statement you have. She will
19 be dealing with population, culture, language,
20 education, employment and has certain specific
21 proposals.

22 We've had to reshuffle in the interim
23 some of the witnesses specifically related to the
24 Metis, because these are non-Metis witnesses brought in
25 as experts. So as one group we will hear from Mr.

1 Bjornaa, the president of the Metis, Harry Daniels,
2 former national president of the Metis and presently
3 with the Metis of Ontario in Sault Ste Marie, and Henry
4 Wetelainen who is the first vice-president of OMAA.
5 Mr. Wetelainen was an original witness and he will be
6 scheduled with that particular group as a panel.

7 We had anticipated going with those
8 three, Mr. Bjornaa, Mr. Daniels and Mr. Wetelainen as a
9 group today as a matter of fact, because we didn't
10 know -- as of yesterday we didn't even know about the
11 airplanes scheduling and we spent most of yesterday and
12 the day before trying to get the witnesses here and
13 making sure that they would arrive. Fortunately
14 everybody's here.

15 As far as Beardmore, I say we need some
16 times because emotions are running high in the
17 Beardmore area and we will be meeting with them,
18 talking to them, talking to Mr. Reid, talking to the
19 chief and we would like to keep that together as one
20 panel.

21 MADAM CHAIR: Mr. Irwin, the Board will
22 interrupt you here. When you speak of the Beardmore
23 group, are you speaking of Chief Theron McCrady --

24 MR. IRWIN: Mr. Michon.

25 MADAM CHAIR: Harold Michon, Salvanus

1 Nenakanagis.

2 MR. IRWIN: Mm-hmm.

3 MADAM CHAIR: And then there were three
4 additional witnesses that were to have been part of the
5 originally conceived Panel 2 and that was Petr Cizek.

6 MR. IRWIN: He's the expert, he's the
7 consultant.

8 MADAM CHAIR: Nicholas Deleary.

9 MR. IRWIN: Okay. Mr. Deleary, he would
10 be almost in the classification of an expert witness on
11 interpretations and how it affects aboriginal peoples.
12 He was coming here Friday to give evidence, he was
13 scheduled. He phoned me up on Monday -- let's see,
14 what's today, I've lost track of the days.

15 MADAM CHAIR: Wednesday.

16 MR. IRWIN: Wednesday. He phoned me up
17 Monday and says he prefers to be as part of the
18 Beardmore evidence, so he asked if his evidence could
19 come in at the same time as theirs.

20 MADAM CHAIR: All right. And then the
21 final person mentioned as part of the original Panel 2
22 was Mr. Ronald Morrisseau.

23 MR. IRWIN: Okay. Mr. Morrisseau, I
24 would like to get him down. He's an elder, he's very
25 understood, very interesting, but as of last Tuesday he

1 was suffering from a cold from lying down at the
2 blockade. I'm hoping to have him as part of this
3 so-called Beardmore group. I'm using that term really
4 loosely because it's a combination of people that did a
5 lot of work in Beardmore.

6 MADAM CHAIR: All right. Okay. Let's
7 start at the top for the Board's understanding of what
8 we're going to be listening to.

9 MR. IRWIN: Professor Morse -- I'm sorry.

10 MADAM CHAIR: In Panel 1 you are going
11 to--

12 MR. IRWIN: Professor Morse.

13 MADAM CHAIR: --you are going to lead the
14 evidence of Professor Brad Morse.

15 MR. IRWIN: Right.

16 MADAM CHAIR: Now, Professor Morse was
17 mentioned in witness statement...?

18 MR. FREIDIN: 3.

19 MR. MARTEL: No. 3.

20 MADAM CHAIR: No. 3 originally.

21 MR. IRWIN: And he will be dealing with
22 his statement.

23 MADAM CHAIR: So the Board is to take it
24 that Professor Morse's evidence will still be on the
25 relationship of aboriginal and treaty rights.

1 MR. IRWIN: We'll be going through the
2 statement first.

3 MADAM CHAIR: And this will be Panel 1.

4 MR. IRWIN: Right, today.

5 MADAM CHAIR: Okay.

6 MR. IRWIN: It should take probably the
7 afternoon.

8 MADAM CHAIR: All right. What is now
9 Panel 2 was in fact previously Panel 1 with respect to
10 Mr. Bjornaa's evidence on the overview of OMAA.

11 MR. IRWIN: Yes.

12 MADAM CHAIR: And its peoples, but...

13 MR. IRWIN: With a caveat on that. Mrs.
14 Misek was here last week and one of her children has
15 the cold and she's hoping to get in and out of here in
16 a day. She's coming in tomorrow. I was hoping she
17 would stay over until Thursday.

18 So I may have to shuffle those two to get
19 her back to the family, although I'll know more about
20 that later on in the day on Mrs. Misek.

21 MADAM CHAIR: Okay.

22 MR. MARTEL: Tomorrow is Thursday.

23 MR. IRWIN: Friday, Pardon me, Friday.

24 MR. MARTEL: Oh, Friday. Fine, thank
25 you.

1 MADAM CHAIR: So what is the difference
2 between the evidence that Ms. Misek will be testifyng
3 to verus Mr. Bjornaa; is it the same?

4 MR. IRWIN: No. Mrs. Misek will be
5 dealing with populations, which is always of interest
6 to MNR and of little to me, culture, language,
7 education, employment and peoples.

8 MADAM CHAIR: And her evidence will be
9 restricted to what is in the witness statement?

10 MR. IRWIN: She has three witnesses; the
11 1 and 2 are population and the third is social
12 economic, but there's a fourth one. Did the Board get
13 the fourth one that combines 1 and 2? It was supposed
14 to have been sent in, the fourth statement. It's an
15 update on 1 and 2 and I was going to deal with just the
16 fourth statement which combines 1 and 2.

17 MADAM CHAIR: We haven't received
18 anything from OMAA with respect to written evidence.

19 MR. FREIDIN: I think Mr. Irwin is
20 referring to reports No. 1, 2.

21 MADAM CHAIR: Oh. Panel number what, Mr.
22 Freidin?

23 MR. FREIDIN: And 3, which are attached
24 as part of witness statement No. 1.

25 MADAM CHAIR: All right.

1 MR. FREIDIN: And I think those are in
2 relation to population that Ms. Misek will testify to.

3 MR. IRWIN: And she combined reports 1
4 and 2 into more updated reports and she said she sent
5 them, but I'm not sure if you received them.

6 MR. FREIDIN: We didn't. I would just
7 advise Mr. Irwin we didn't receive a copy, either so we
8 will get it later on.

9 MR. IRWIN: Okay.

10 MR. MARTEL: So in essence Panel 2, your
11 next panel, will be parts of 1, 2 and 3 put into a new
12 panel by Margaret Misek.

13 MR. IRWIN: Mrs. Misek is a panel all of
14 her own.

15 MR. MARTEL: Yeah, but that's the second
16 panel of evidence we're going to hear is hers; is that
17 right?

18 MR. IRWIN: Yes.

19 MR. MARTEL: Taking what she's combined.

20 MR. IRWIN: Oh yes. Right, right.

21 MADAM CHAIR: Mr. Irwin, Ms. Misek's
22 evidence, her written evidence appears in the original
23 Panel 1 material and its appendices, and that's what
24 we're going to hear from her tomorrow or Friday?

25 MR. IRWIN: Right. Except that statement

1 is a combination of what happened on the ground with
2 Mr. Michon and so on, okay, which is completely
3 different type of evidence of Mrs. Misk's, which is
4 population at large and she's talking more globally
5 than specifically Beardmore.

6 MADAM CHAIR: Yes, that's fine.

7 All right. Now, Mr. Harry Daniels. Mr.
8 Daniels has no written evidence before the board.

9 MR. IRWIN: That's correct. No, he
10 doesn't.

11 MADAM CHAIR: And he will be testifying
12 in his capacity as --

13 MR. IRWIN: Okay. Mr. Daniels is an
14 author, he's been the past president of the Native
15 Council of Canada, many many positions through the
16 Metis community.

17 He's made presentations to the Joint
18 Committee on the Constitution, to provincial boards, to
19 the James Bay Agreement, to the Senate. I'm
20 summarizing this very quickly.

21 He will take -- we're hoping that Mr.
22 Daniels' evidence ties in with Professor Morse's in the
23 sense that Professor Morse will deal with the legal
24 aspects from actually the Royal Proclamation, and there
25 will be a certain overlapping by Mr. Daniels who was in

1 fact not there as a lawyer but there on the ground
2 during the constitutional hearings specifically in his
3 former position as national president of the NCC.

4 Their evidence will be similar but
5 different, they will be looking at the same set of
6 facts from different eyes.

7 MADAM CHAIR: Now, the third panel member
8 that you've identified for your new Panel 2 is Mr.
9 Henry Wetelainen.

10 MR. IRWIN: Wetelainen. I'm probably
11 mispronouncing it.

12 MADAM CHAIR: Wetelainen. And could you
13 spell Mr. Wetelainen's name for the Board, although we
14 do have his evidence.

15 MR. IRWIN: Yeah, on one of the panels.

16 MADAM CHAIR: Mr. Wetelainen was
17 identified in our original Panel No. 4.

18 MR. IRWIN: Oh, you have it here.
19 W-e-t-e-l-a-i-n-e-n.

20 MADAM CHAIR: Thank you. And to which
21 topics will Mr. Wetelainen be addressing his --

22 MR. IRWIN: Primarily where are we going
23 from here. Of course there's an Irish saying, that if
24 you don't know where you're going any road will get you
25 there.

1 Where are we going from here, sort of
2 the hiatus period between these hearings and models
3 and, for instance, Mr. Wetelainen is in town
4 negotiating with Ontario Hydro on specific models of
5 native management because we felt at some point the
6 Board would have to get away, and the onus is on us to
7 get you away from it, general terms like aboriginal,
8 time immemorial, say: What does this mean? Does this
9 mean moose licences, does this mean a per cent.

10 And Mr. Wetelainen, who has had direct
11 negotiations, we thought his evidence would be of
12 interest specific because it's so recent, it's as of
13 yesterday on where the governments and the natives are,
14 in what direction they're heading as far as actual
15 models.

16 MADAM CHAIR: Now, with respect to Mr.
17 Louis Ainslie who was previously identified as being a
18 witness for Panel 4, will we be hearing from that
19 gentleman?

20 MR. IRWIN: I don't know at this stage.

21 MADAM CHAIR: And also a Professor
22 Dunster had been previously identified as a potential
23 witness for OMAA's case.

24 His appearance had been discussed but
25 never planned, and shall we conclude that we won't be

1 hearing from a Professor Dunster?

2 MR. IRWIN: That's the first I've heard
3 the name.

4 MR. FREIDIN: Just while we're on that
5 particular panel, Madam Chair, I'm just wondering
6 whether Mr. Irwin can assist. Panel No. 4, in which
7 Mr. Wetelainen was going to be one of the witnesses,
8 seems to deal with issues which go beyond or are
9 additional to those that you indicated he would speak
10 about, sort of, where do we go from here.

11 MR. IRWIN: That's correct.

12 MR. FREIDIN: Would it be appropriate for
13 us then to cross-examine Mr. Wetelainen on Panel No. 4
14 evidence at that time in that you have indicated that
15 you don't plan to have any specific witness speak to
16 Panel 4?

17 MR. IRWIN: You have a written statement
18 for Panel No. 4.

19 MR. FREIDIN: Yes.

20 MR. IRWIN: I'm going to have to confer
21 with OMAA on that for your question. I don't have an
22 answer at this stage.

23 MADAM CHAIR: All right.

24 So, Mr. Irwin, the Board is to take it
25 then that with this new roster of witnesses that we

1 will put aside written witness statements for Panels 2
2 and 4 for the present time?

3 MR. IRWIN: Yes.

4 MADAM CHAIR: And the evidence we will
5 hear in the next day or two will be speaking to the
6 written evidence of Panel 1 and 3?

7 MR. IRWIN: That would be Professor Morse
8 and Mrs. Misek, yes.

9 MADAM CHAIR: That's right. Just so the
10 Board has it clear in its mind what we will look at as
11 we go through the evidence.

12 Before I ask some more questions, will
13 there be any -- do any of the counsel wish to clarify
14 any of these matters, or will there be any objections
15 to Mr. Irwin's proposal as to how he wishes to lead his
16 evidence for the next few days. I don't know where
17 we're going after that.

18 Mr. Freidin?

19 MR. FREIDIN: I have no problem other
20 than I'll have a discussion with Mr. Irwin about how we
21 are going to deal with the final witness statement No.
22 4, if in fact no witness is going to be available for
23 cross-examination on it.

24 I think we will probably be able to
25 settle that, but other than that and obtaining a copy

1 of the new material from Marge Misek --

2 MADAM CHAIR: Well, I don't think --

3 MR. FREIDIN: Again, which I'm hopeful
4 will not be a problem, but when I see it if there's
5 going to be any problem in me dealing with it in the
6 short time frame that we have, I'll advise you, but I'm
7 assuming that I will be able to deal with it.

8 So subject to that, I don't think we're
9 going to have a problem.

10 MADAM CHAIR: Mr. Freidin, the new
11 material you're referring to is this paper dated July
12 19, '91 which Mr. Irwin has just handed to the Board?

13 MR. FREIDIN: That's correct. We have
14 not seen that.

15 MADAM CHAIR: Perhaps your people could
16 look at it quickly and ascertain whether it is included
17 in any of the other written material we have in the
18 witness statements.

19 I understand from Mr. Irwin that it's
20 drawn from the three appendices which are reports to
21 witness Panel 1.

22 MR. IRWIN: Yes, it's an update of Mrs.
23 Misek's report No. 1 and report No. 2.

24 MADAM CHAIR: Which are in Panel 1.

25 MR. FREIDIN: We do not have the update.

1 We have the original report No. 1 and 2. If this is an
2 update, we don't have it.

3 MR. IRWIN: This is as of July, 1991.

4 MADAM CHAIR: Is it an update of the data
5 or is it a summary of what's in the --

6 MR. IRWIN: It's an update of data, more
7 current figures.

8 MADAM CHAIR: All right. We'll enter
9 that as a separate exhibit. Thank you, Mr. Irwin.

10 Do other counsel have anything they wish
11 to say at this point. Mr. Hunt?

12 MR. HUNT: No, thank you.

13 MS. GILLESPIE: Nothing.

14 MADAM CHAIR: Mr. Irwin, is it your
15 intention to spend today completing the evidence of
16 Professor Morse?

17 MR. IRWIN: Yes.

18 MADAM CHAIR: Tomorrow to complete the
19 evidence of Messrs. Bjornaa, Daniels and Wetelainen and
20 perhaps begin Ms. Misek?

21 MR. IRWIN: Or maybe the reverse. It's
22 possible it might be the reverse.

23 MADAM CHAIR: Start with Ms. Misek.

24 MR. IRWIN: Yes.

25 MADAM CHAIR: And then on Friday complete

1 the evidence of the three gentlemen who are identified
2 as being in Panel 2?

3 MR. IRWIN: Yes.

4 MADAM CHAIR: All right. We aren't sure
5 whether we should begin at this point or we should have
6 a discussion about what our future scheduling will be.

7 You don't have instructions yet about
8 Panel 5 from your clients, you don't know what will be
9 the case with the six witnesses identified as the
10 Beardmore evidence, and are those the two outstanding
11 scheduling issues?

12 MR. IRWIN: Yes.

13 MADAM CHAIR: And we're not sure what you
14 will do about the written evidence for witness Panel 4.

15 MR. IRWIN: That's correct.

16 MADAM CHAIR: The Board has discussed
17 this before we came today and it would be our
18 suggestion, if you agree, you're scheduled for two days
19 next week - your case had been scheduled for the 16th
20 and the 19th of September - it would seem to the Board
21 practical that that won't be useful time because there
22 are decisions your client has to make.

23 MR. IRWIN: I indicated that to Mr.
24 Pascoe this morning. I don't think that there would be
25 witnesses for Monday and Tuesday.

1 MADAM CHAIR: In that case, unless there
2 are any comments from counsel or any objections from
3 anyone else, the Board will reschedule OMAA's evidence
4 but we would ask you in the meantime to discuss these
5 matters with Mr. Pascoe, perhaps by Friday we will have
6 some better idea of how we could schedule the remainder
7 of this case.

8 As I said, we encourage Mr. Irwin and the
9 other counsel in this room to discuss the scheduling
10 matters with Mr. Pascoe over the next day or two and,
11 at the very outset, we would need to know before
12 September 23rd how OMAA intends to proceed with its
13 evidence because we will be scheduling other aspects of
14 the hearing on that date.

15 If you wanted, Mr. Irwin, the Board would
16 afford your clients the opportunity to appear before us
17 on September 23rd when we are going to be hearing
18 submissions from the Ontario Federation of Anglers &
19 Hunters with respect to scheduling other aspects of the
20 hearing.

21 You might be able to resolve the
22 scheduling matter without talking to us again, but if
23 you needed that opportunity it would be September 23rd.

24 MR. IRWIN: Thank you.

25 MADAM CHAIR: With that I think we're

1 ready to begin, unless there are any other comments or
2 matters we have to take care of.

3 Mr. Hunt?

4 MR. HUNT: Well, I did have a comment and
5 it pertains to the evidence of Professor Morse - if we
6 are about to move into that, now would be an
7 appropriate time - there are other matters we were
8 going to deal with before that.

9 My comment, and I hate to, having just
10 introduced myself, start off by making objections, but
11 in fairness to my friends and to the Board, I want to
12 raise a matter so that there's no misunderstanding at
13 some later point in time with respect to the position
14 the OFIA.

15 We take no objection to the Board hearing
16 the evidence that Professor Morse is going to give
17 today, it will be evidence that will provide a
18 background for other evidence that the Board will hear
19 and we have no objection to its relevance on that
20 issue.

21 However, at the end of the day when it
22 comes time for argument, it will be our position - and
23 I make this position clear now because I believe that
24 it arises out of the witness statement that Professor
25 Morse is going to speak to - it will be our position

1 that it is beyond the competence of this Board to make
2 legal decisions with respect to land claims, either
3 directly or indirectly raised, aboriginal rights or
4 treaty rights, that those are matters involving legal
5 interpretations, some constitutional interpretations
6 that are properly brought before the courts in law, and
7 that this panel does not need to -- indeed it's beyond
8 the competency of this panel to get in those issues.

9 I don't ask for any ruling on that today
10 but at a later point in time we intend to make those
11 submissions to the panel and I wanted to make that
12 point because I didn't want anyone to believe that it
13 was not clearly stated before the examination of this
14 witness.

15 So those are my only comments as a
16 prelude to Professor Morse.

17 MADAM CHAIR: Thank you, Mr. Hunt. The
18 Board is well aware of the position of the OFIA on
19 these matters and that position has been stated a
20 number of times on the record.

21 Please begin, Mr. Irwin.

22 MR. IRWIN: Okay. Thank you, Madam
23 Chair. Shall I call my first witness?

24 MADAM CHAIR: Please. Mr. Irwin --
25 excuse me, Mr. Irwin. We typically swear in or affirm

1 your witnesses and perhaps you could ask Professor
2 Morse which he prefers.

3 MR. IRWIN: --Where is he sworn in?

4 THE WITNESS: The oath is fine.

5 BRAD MORSE, Sworn

6 DIRECT EXAMINATION BY MR. IRWIN:

7 Q. Professor Morse, you are presently at
8 the University of Ottawa; is that correct?

9 A. That's correct.

10 Q. I wanted to deal a bit with your
11 resume and I don't want to take too long on it because
12 it's probably the longest resume I've ever seen. I
13 don't know how you had time to get here, I thought you
14 would be writing a book somewhere.

15 A. A little bit of juggling.

16 Q. You've taught many native courses.
17 Your professional consulting experience is set out on
18 page 2 and you have been a consultant to many
19 aboriginal groups here in Canada and abroad, diverse:
20 Walpole Island Band Dam, the Iroquois and Allied
21 Indians on page 3, the Ontario Native Council Justice,
22 the Aboriginal Development Commission of Australia, the
23 Ministry of Justice for Canada - I'm just picking them
24 at random.

25 And on page 4 you have been an consultant

1 to the Law Reform Commission of Canada, honorary
2 consultant to the Attorney General of Australia. How
3 did you wind up doing the Australia work?

4 A. In that particular capacity I was
5 asked by the Austrailia Law Reform Commission and the
6 Government of Australia to be of some assistance to
7 them on a reference that they were undertaking for I
8 guess about nine years on aboriginal customary law.

9 Q. On page 5 your academic and
10 administrative activities run for the full page and
11 half the next. Your academic appointments cover The
12 Aboriginal Law Research Unit at New South Wales, The
13 Native People and Justice in Canada, been a Canadian
14 visiting fellow at Sydney, Australia.

15 Your selective activities in
16 organizations run for a further two pages and on page 8
17 you have 12 published papers; page 9, 14 chapters in
18 books - 9 and 10 - page 10, 14 books and monograms
19 everything from Indian Tribal Courts of the United
20 States to the Indian Metis People of Canada.

21 Page 12, 250 book reviews and over on to
22 13; unpublished reports and studies from 13 to the
23 bottom of page 14, and then there are seven pages of
24 conferences and commissions.

25 This is truly amazing. I mean, at my age

1 it takes a lot to impress me. I must admit, I'm
2 impressed by this.

3 A. And that's a bit out of date.

4 Q. I mean, you don't have to send in the
5 consultant report just say it in the resume.

6 MR. MARTEL: I just want to know what he
7 does in his spare time.

8 THE WITNESS: Not enough.

9 MR. IRWIN: Q. 22, you've been a guest
10 lecturer on staff seminars at Dalhousie, Carlton, New
11 South Wales. Where's the Monash University?

12 A. That's in suburban Melbourne,
13 Australia.

14 Q. Okay. Sydney, University of
15 Queensland, University of Hong Kong, New Guinea.

16 Page 24 you have books or works in
17 process, articles and books, and I would assume that
18 this is out of date, they've been published.

19 And one I found fascinating was your last
20 one, The American Annexation of Hawaii. Has that been
21 written?

22 A. Yes, that's now published in
23 Connecticut Journal of International Law.

24 Q. Now, Professor Morse, you have
25 prepared a paper, an opinion that we've lodged with the

1 commission and it's been distributed and I want to take
2 you through that, and I have no intention of taking you
3 through verbatim, I'm looking for nuances and direction
4 and some meat and human interest in the various cases,
5 and I'm going to start at the beginning where you
6 indicate that --

7 MADAM CHAIR: Excuse me, Mr. Irwin.
8 Before we do that, one point of administration. We
9 give an exhibit number--

10 MR. IRWIN: Oh, I'm sorry.

11 MADAM CHAIR: --to the written witness
12 statements, and in this case Professor Morse's evidence
13 will comprise Exhibit 1913.

14 MR. IRWIN: One thousand nine hundred...?

15 MADAM CHAIR: 1913.

16 MR. IRWIN: Sorry.

17 MADAM CHAIR: The title of this evidence
18 remains the same and, that is, The Relationship Between
19 the Aboriginal and Treaty Rights of OMAA's Peoples and
20 Environmental Assessments in Ontario.

21 What do you want to do with respect to
22 numbering of this evidence. Do you wish to make this
23 your witness statement No. 1?

24 MR. IRWIN: Yes.

25 MADAM CHAIR: All right. Then will

1 everyone please make those changes on the documents
2 because it will be easier for our future reference if
3 we refer to this document as OMAA's witness statement
4 No. 1.

5 ---EXHIBIT NO. 1913: OMAA Witness Statement re:
6 evidence of Professor Brad Morse.

7 MADAM CHAIR: And on a second matter,
8 could you succinctly describe for the Board in what
9 capacity you're qualifying Professor Morse?

10 MR. IRWIN: Q. How would you describe
11 yourself, expert in what?

12 A. That's a question I'm reluctant to
13 answer. I guess I might describe myself as someone
14 with some expertise in relation to the relationship
15 between national legal systems and aboriginal peoples
16 with particular -- most of my background has been on
17 these issues in Canada but also reasonably extensive
18 background in Australia, the United States and New
19 Zealand.

20 MR. IRWIN: Thank you.

21 MADAM CHAIR: Are there any objections
22 from the parties to Professor Morse being so qualified?

23 Please continue, Mr. Irwin.

24 MR. IRWIN: Q. Professor Morse, in your
25 introduction to your report you talk generally the

1 difference between what happened with the development
2 of natives in Canada as compared to United States where
3 it was Treaty versus Conquests.

4 Do you want to just open up with that?
5 By amplifying those remarks?

6 A. I'd be happy to.

7 Let me begin -- I should indicate that
8 this witness statement is very much designed to provide
9 an overview to the Board.

10 The title and the issues addressed within
11 the paper could very easily be covered in 300 pages,
12 rather being a little under 30 pages, if not
13 significantly longer, and that applies both in terms of
14 the historical summary that is present in the first few
15 pages, there are a number of books on that, and
16 likewise on the legal issues relating and flowing from
17 the relationship between aboriginal peoples and the
18 Crown.

19 So it is intended to provide very much an
20 overview or introduction or summary, and my thinking
21 was that that would be more beneficial for the Board
22 and significantly easier for it to deal with than a
23 witness statement of several hundred pages in length.

24 What I have attempted to do in the
25 opening few pages is to set a bit of an historical

1 context in which one can begin to address and consider
2 the origins of the legal and political relationship
3 between aboriginal peoples in what is now called Canada
4 and the Crown.

5 I have attempted to address here, of
6 course, is that the experience of contact or
7 colonization in practical terms began in the early
8 1600's, initially of course with the arrival of
9 explorers and subsequently with settlers.

10 The context then at that time was of a
11 huge aboriginal population, in fact much larger than
12 the aboriginal population in Canada today, about three
13 times as large as it's current population in Canada
14 today, occupying the vast majority of this land, not as
15 an homogeneous group but rather more akin to the
16 occupation of Europe, consisting of a number of
17 different nations that have now come under the label
18 Indian, not a term that existed at the time, not a term
19 that they used in reference to each other, but
20 distinctly different nations such as a Cree, Ojibway,
21 Micmac, Haida, from coast to coast and with, of course,
22 the Inuit in the far north just as in Europe we have
23 Germans, French, Dutch, et cetera.

24 Given the large numbers of aboriginal
25 people, and given as well their military superiority at

1 the time, and given the lucrative attractions to
2 entering into trading relations for Europeans, the
3 approach quickly selected by Europeans was to enter
4 into formal relations with the different nations that
5 they encountered attempting wherever possible to enter
6 into peaceful relations, and those peaceful relations
7 were usually consecrated in a treaty.

8 The earliest treaties are not in writing
9 but are rather symbolized through physical objects, and
10 one of those that is discussed to some degree in the
11 early pages is the Two Row Wampum.

12 Q. The Two Row Wampum, you don't see it
13 here, but that was a treaty with the Iroquois nation?

14 A. Yes, it's a treaty between the
15 Iroquois Confederacy, at the time five nations. They
16 first embarked upon this treaty with the Dutch then
17 with the French and then with the British.

18 The gist of this treaty, and it is
19 represented originally by shells and now by a beaded
20 belt, and the concept of the two rows was to reflect
21 that there was one row represented Europeans, one row
22 represented the Iroquois. The two rows went side by
23 side each other and the imagery here and the oral
24 explanation of this and the oral tradition, is that
25 each row symbolized the river of life within which

1 there would be a boat or canoe.

2 The Europeans were in their large ship.
3 With them they carried all of their laws, their
4 culture, their language, their beliefs, the things that
5 they needed to survive and flourish.

6 Alongside that large ship was the
7 Iroquois in their canoe in which they also maintained
8 their laws, their cultures, their languages, their
9 beliefs.

10 The imagery then was that both would go
11 side by side down the river of life, that they would
12 have friendly relations but that the Europeans would
13 have their ship, the Iroquois would have their canoe.
14 Both would co-exist. Each in having its own laws would
15 as well of course have its own governments. They were
16 in, however, the same river and the imagery here, and
17 the clear intention was that both would co-exist in the
18 same land.

19 The concept there was that this peaceful
20 relationship would continue to exist, would go off in
21 the future. That from time to time it would become
22 necessary to polish the silver that was on the end of
23 this belt or this wampum, and that that would be an act
24 of reminding both parties and renewing their commitment
25 to this continued relationship.

1 Q. You stated that there was military
2 superiority at the time, and you have dealt with the
3 mid 1600's to early 1600's into the 1700's.

4 Did this military superiority become
5 important to the Europeans, specifically Great Britain?

6 A. Well it was very important to Great
7 Britain in several senses. One, because do the
8 military effectiveness of aboriginal people there was a
9 threat from the British standpoint that if they engaged
10 in hostilities with Indian nations that that would
11 cause considerable loss of life for Britain and
12 threaten the fragile colonies.

13 It was also relevant in terms of the
14 relationship among European nations. Initially of
15 course between English and French and each sought
16 allies from different Indian nations to ally with them
17 to strengthen their position in relation to their
18 competition. From the French perspective their
19 competition being the British and vice versa from the
20 British standpoint.

21 Q. You speak about treaties with the
22 Micmac and Malecites. Were these the type of treaties
23 that --

24 A. Those are examples of the Crown -- in
25 that case those are treaties signed by the English

1 Crown with the Micmac nations, Malecite nations and
2 they extend actually from Massachusetts up into
3 Atlantic Canada.

4 There are a series of these treaties in
5 part because a treaty would be reached, it committed
6 the parties to peace and friendship, but there was
7 still some conflict, in part because of still expanding
8 British settlements. So some tensions would arise,
9 occasionally some hostilities, and a renewal of that
10 treaty of peace and friendship would be made through a
11 subsequent treaty. So we have a number of these
12 treaties through the 1700's of this type.

13 Q. And the Micmacs would be part of the
14 linguistic group stretching from the Micmacs of New
15 Brunswick to, I suppose, the grande ventre of the
16 Bloods of Alberta. So you have some linguistic
17 continuity that would start?

18 A. Well, I wouldn't quite want to claim
19 expertise in linguistics.

20 Q. I'll pass on that.

21 A. But they're clearly for a large
22 portion and there's some linguist similarities, but
23 there are also significant differences as you had --

24 Q. I want to get on to Royal
25 Proclamation. Everybody talks about the Royal

1 Proclamation of October 7, 1763, but generally it's
2 little understood. Have you researched it, you looked
3 at it, you know it intimately.

4 What is the Royal Proclamation? That is,
5 its significance? What does it say? Why is it
6 important today?

7 A. Well, let me begin by addressing the
8 terms of its significance at the time.

9 The Royal Proclamation of 1763 is
10 intended by Great Britain to confirm and codify what
11 was the pre-existing British policy. This policy of
12 entering into treaties with Indian nations. As well
13 the British policy involved a recognition of the rights
14 of aboriginal people as possessors of the soil.

15 Many Indian nations were allies of Great
16 Britain in its conflict with France. Some nations were
17 adversaries who had allied themselves with the French.

18 The Royal Proclamation issues after the
19 treaty between France and England and is designed to
20 meet several purposes. It is designed to reassure the
21 Indian nations that had been British allies that their
22 allegiance and military support would be continued to
23 be respected. That the defeat of France would not
24 diminish those royal commitments. That British policy.

25 Secondly, it was designed to try and

1 reassure the Indian nations that had been allies with
2 France, such as the Huron, that they would receive
3 equal treatment to the Indian nations that had been
4 allies of Great Britain.

5 Thirdly, it was designed to make very
6 clear to the new colonies that were being created out
7 of new France, as well as to the existing colonies,
8 that they were compelled to continue to adhere to
9 British policy, which was not to dislodge aboriginal
10 people from their territory.

11 To leave, as the language of the Royal
12 Proclamation says, the Indian tribes or nations
13 undisturbed. They were not to be molested.

14 A fourth purpose of the Royal
15 Proclamation as it relates to aboriginal people, and I
16 should mention the Royal Proclamation does other things
17 as far as non-aboriginal people. It creates, for
18 example, the colony of Quebec and it creates a
19 government for the colony of Quebec as well as for
20 Florida, et cetera.

21 But a fourth purpose of it, in relation
22 to aboriginal people, was to make clear that only the
23 Crown could acquire aboriginal title. Could acquire
24 land from aboriginal people. That this was an
25 exclusive Crown prerogative, a monopoly possessed by

1 the Crown. Therefore, colonial governors, even if they
2 did not have authority, could not acquire land and
3 individual colonies could not acquire land from Indian
4 nations. And this is part of the Royal Proclamation
5 that speaks to trying to avoid frauds and abuses.

6 It indicates, therefore, that the Crown
7 alone can acquire the land and, in addition, it goes on
8 to describe how that should occur. It creates a
9 specific process.

10 It makes clear that Indian nations, where
11 they wish to sell land for settlement, and it's
12 entirely their prerogative, then this purchase should
13 be acquired through a particular process. It should
14 involve a public meeting. That is, the negotiations
15 should occur in public, not behind closed doors. That
16 it should be in front of all of the aboriginal people.
17 That they are, therefore, aware of what is being
18 negotiated. That their representatives, who would be
19 the actual negotiators and who would sign such a treaty
20 are doing so with the clear permission and authority of
21 the aboriginal community as a whole, and that, in part,
22 reflects simply that Indian nations are very democratic
23 and they do not invest in their leaders the kind of
24 unlimited authority that the Crown had at the time, or
25 even the limited authority that non-aboriginal society

1 invests in politicians to go forth between elections
2 and exercise their powers. Instead it's very
3 democratic. The leaders, therefore, had to acquire the
4 consent of the community as a whole. So these
5 negotiations was to occur in public with
6 representatives of the Crown that were duly authorized
7 to enter into these negotiations and acquire a treaty.

8 Now what's the significance of all this?
9 Well, this latter part that I was speaking of, this
10 procedure of acquiring land, has in fact continued to
11 be used ever since. We see it evident in the
12 provisions in the Indian Act that deal with surrenders
13 of reserves. The same kind of process is to occur.

14 Negotiations is solely with the Crown.
15 It occurs in public. The First Nation as a whole must
16 vote in favour of the surrender. If they vote against
17 then it's over. So we see it evident.

18 Q. Just come back to that point.

19 I didn't get a chance to see the decision
20 today on the -- in Northern Quebec. Did you get a
21 chance to look at that?

22 A. I managed to read, I guess about half
23 of it.

24 Q. Now I only saw newspaper reports that
25 the judge held that there wasn't enough consultation or

1 the Act wasn't sufficient.

2 MADAM CHAIR: Excuse me, Mr. Irwin. This
3 isn't going to be very helpful to the Board unless we
4 know what you're talking about.

5 MR. IRWIN: Okay.

6 Q. Did you get a chance to look at the
7 decision that --

8 A. I've gotten part of it.

9 Q. You just happen to have it there?

10 A. Well, I've had it faxed down to me.
11 Unfortunately, so far only the first part has arrived.
12 The decision is called The Cree Regional Authority and
13 Bill Namagoose, N-a-m-a-g-o-o-s-e, and Raymond
14 Robinson, R-o-b-i-n-s-o-n, and the intervenors include
15 Procureur General Du Quebec and Hydro-Quebec and
16 Makivik Corporation, M-a-k-i-v-i-k.

17 Now that is a decision of the Federal
18 Court trial division of Mr. Justice Rouleau,
19 R-o-u-l-e-a-u. A decision in reference to a case
20 brought by the Cree arguing that their treaty, the
21 James Bay Northern Quebec Agreement, is binding upon
22 -the governments of Canada and Quebec, and therefore
23 that the environmental process of that agreement must
24 be honoured and the process itself must be followed in
25 dealing with the questions of what are the

1 environmental consequences of the proposed Great Whale
2 Project.

3 MR. MARTEL: Could I ask a question. I
4 want to back up just for a moment.

5 You talked about the acquiring of land
6 and surrendering of reserves. What happened in B.C.
7 then? As I understand it most of the land that's been
8 grabbed was -- there's no treaty for, and you said they
9 had to vote. So I'm just wondering if you have any
10 familiarity with what happened there because from my
11 understanding of it there was never a vote and there
12 was never a treaty, and how does one then say that we
13 have always followed what was agreed to?

14 MR. IRWIN: I think we were supposed to
15 follow it. There have been some delineations of what
16 we were supposed to do and what we've actually done but
17 we talked about B.C. earlier today.

18 THE WITNESS: Perhaps I can be of some
19 assistance in that regard.

20 The Imperial policy I think was
21 reasonably clear and consistently followed. Upon
22 Confederation, 1867, the first compact of four
23 colonies, the question became what to do with this
24 Imperial authority. What government would receive it,
25 number one, and Section 91(24) of the Constitution Act,

1 1867, was intended to resolve that issue. That it
2 would be the Government of Canada that would have the
3 authority in relation to Indians and lands reserved for
4 Indians. So that they had the authority to honour the
5 existing treaties and to continue that process where it
6 had not taken place.

7 However the added complication, of
8 course, is that Section 109 of the same Constitution
9 Act, 1867, gave the general ownership of land to the
10 province.

11 In British Columbia, pre-confederation,
12 initially, when it was the Hudson's Bay Company and
13 subsequently as the Colony of British Columbia,
14 followed a policy of negotiating treaties, and if
15 memory serves me correct, 13 treaties were negotiated
16 on Vancouver Island and those treaties have been upheld
17 in a string of cases over the years. So that that
18 policy was being followed in B.C.

19 However, the colony started to run out of
20 money. It turned to the Imperial Government for funds.
21 The Imperial Government said the colony will benefit,
22 you raise the money yourself. The colonial government,
23 the legislature of the day, now in about 1866, stopped
24 allocating money for negotiating these treaties. So
25 the colonial governor stopped negotiating those

1 treaties.

2 B.C. enters Confederation in 1871 and
3 clause 13, as I recall, of the terms of union of
4 British Columbia pass on to the federal government the
5 responsibility for maintaining a policy as liberal as
6 the pre-existing policy of the colony in relation to
7 Indians.

8 However, B.C., the province now, in 1871
9 has consistently, up until last year, taken the
10 position that it would not participate in any of those
11 land claims negotiations. The obligation was
12 exclusively federal, if there was any obligation at
13 all.

14 The federal government, shortly after
15 Confederation, started off with the position that it
16 would respect this treaty process. It invalidated in
17 fact some early provincial legislation on this basis.

18 It ultimately chose not to pursue that
19 process, and the only part of British Columbia that
20 then was subsequently covered by treaty is in
21 northeastern British Columbia, covered by Treaty 8. It
22 extends from Alberta into the Peace River area of
23 British Columbia and so that part is by treaty and the
24 feds did that.

25 The balance of the colony, they did not

1 go by way of treaty and federal argument was they
2 really wanted provincial involvement and the province
3 to pay part of the cost. The province refused. The
4 federal government therefore, although the governments
5 themselves of course have changed, but over the years
6 the federal position is that they would not proceed
7 without doing so.

8 One of B.C.'s arguments as well is that
9 the Royal Proclamation of 1763 did not apply in British
10 Columbia. It did not extend that far west, so it was
11 not obligated to do so. And it is fairly consistently
12 therefore argued that there is no aboriginal title in
13 B.C. If there is, it's not its problem it's a federal
14 problem.

15 The courts have over the past - and
16 perhaps we'll come to that a little later down the
17 road - over the past two decades or so have been giving
18 a very rather clear message that the B.C. government
19 has been wrong, and therefore in August of last year
20 they reversed their position and for the first time
21 they have said that they will now negotiate -- although
22 actually I should say the NDP government in late 1975
23 said the same, but they were not in office long enough
24 to pursue it, so the Social Credit government did so
25 last August and they're now in the midst of land claims

1 negotiations.

2 So this treaty process set out prior to
3 the Royal Proclamation articulated within the Royal
4 Proclamation, 1763, now 218 years later, I guess is
5 finally starting to be followed in the balance of the
6 Province of British Columbia.

7 But that does, I think, perhaps help
8 suggest some of the significance of this Royal
9 Proclamation. In some parts of Canada it's taken a
10 very long time to be followed; in British Columbia or
11 Quebec or the north. In other parts such as Ontario,
12 it was followed quite consistently throughout almost
13 all the province and that continued on through the
14 three Prairie provinces prior to the creation of each
15 of those provinces and subsequently.

16 Q. Now, you make the point in your
17 report that neither the imperial or the colonial, the
18 federal/provincial governments ever defined aboriginal
19 title or aboriginal rights, and I think it gets
20 important when you're talking about traditional uses
21 from time immemorial and what does time immemorial
22 mean.

23 And, in fact, if we look at something
24 taken to infinity it has no meaning, but I believe you
25 have indicated, at least to me earlier today, that it

1 has some legislative meaning and it has some common
2 sense meaning that's been applied to it. Can you
3 amplify that?

4 A. Well, in fact, the concept of time
5 immemorial goes back to the English common law in
6 England and it was an attempt to try and determine the
7 continuing status of English customary law; was English
8 customary law part of the common law, and the courts
9 developed a doctrine called time immemorial which they
10 then fixed at a particular date. As I recall it's--

11 Q. 1166.

12 A. --1166 A.D. If you could prove a
13 custom existed prior to that time and continued
14 thereafter, then it was considered to be a custom that
15 went back to time immemorial and was part of the common
16 law.

17 So that concept was being used in England
18 gets revived in a different context in North America by
19 Canadian and American courts, and they use it I think
20 to some degree for the same purpose, they're dealing
21 with a pre-existing legal system; in the North American
22 context, pre-existing nations, different nations, and
23 the common law has accepted that those nations had
24 their own legal system and had possession of the soil,
25 that that possession of the soil, at least for some of

1 them, has continued.

2 The common law created a doctrine of
3 aboriginal title. This is not a doctrine that comes
4 from the aboriginal law itself, it's not a doctrine of
5 Cree law or Mohawk law, rather it's a doctrine of
6 common law and it's an attempt to try and come to
7 grips, I guess, with the fact that the Crown is
8 attempting to assert overall sovereignty over a
9 territory that is occupied by other people with their
10 own laws and nations.

11 It regulates competition among Europeans,
12 one of its first objectives, so it sorts out which
13 European can kind of stake the right of purchase, if
14 you will, the option to buy going to the so-called
15 discovering nation, and it attempts to transform
16 aboriginal ownership or use of the lands under
17 aboriginal terms into a concept that could be
18 recognized by the common law.

19 A condition for this recognition is that
20 the aboriginal group that alleges that they have this
21 right has to be able to show that they have been
22 occupying the land since time immemorial.

23 Now, that did not mean the same date as
24 in England, nor was there felt a necessity or even an
25 appropriateness to choose a specific date because the

1 question of aboriginal title in practical terms really
2 only arises when the the Crown seeks to acquire
3 - territory or exert jurisdiction over the territory, so
4 long as the Crown is not around, there are no settlers
5 or developers interested in the territory, it's not an
6 issue.

7 Q. I believe you said -- getting back to
8 when, changing concepts, you've indicated somewhere
9 some time that it's different in different parts of
10 Canada because it has become related to when the first
11 settlers came face to face with different natives
12 tribes.

13 A. That's what I'm driving at. So the
14 practical significance then of this is when the Crown
15 is interested in acquiring title to territory because
16 it wishes to use it in the practical terms for
17 settlement, for logging, for mining, for hydroelectric
18 purposes, now it is coming forth to the aboriginal
19 group that is being undisturbed and unmolested as the
20 Royal Proclamation says and saying: We wish to acquire
21 your land. So it's at that particular point in time
22 that it has to -- from the Crown standpoint, it has to
23 determine that it is dealing with the right group, the
24 people who do possess title to the lands.

25 So for the Crown, for example, in dealing

1 with southwestern Ontario, let's say it is looking at
2 this issue in the 1790s in negotiating the Treaty of
3 1797, when we come up here in 1797 the Crown is
4 uninterested in Thunder Bay, what is now called Thunder
5 Bay, it does not involve itself, it does not seek to
6 negotiate treaties it's not particularly worried with
7 who's occupying.

8 When it comes forth into this region
9 because it wishes to occupy it's now saying: Okay,
10 from the Crown's perspective, who is it that I must
11 deal with it, who is the group that has the rightful
12 claim to this land.

13 So it's at that particular point in time
14 that it's crystallized and it is wishing to ascertain:
15 Am I dealing with the group that is in possession now
16 and has been in possession for some period of time.

17 It does not have to pick a particular
18 point in time, and part of the reason for also as well,
19 of course, is that the boundaries of Indian nations,
20 like the boundaries European nations, changed over
21 time, so that if we picked a particular date then we
22 might find that the aboriginal group that was in
23 occupation of the lands at that time is no longer
24 there, in some cases may no longer exist, hundreds of
25 years later.

1 Q. How did this date change, say, as we
2 got further north into the Arctic and the Inuits?

3 A. Well, in a practical sense today, for
4 example, in the eastern Arctic land claims are being
5 negotiated with the Tungavik Federation of Nunavut.
6 Tungavik is T-u-n-g-a-v-i-k, Nunavut is N-u-n-a-v-u-t.
7 They are the Inuit people who are occupying that land
8 today.

9 The Government of Canada has said: We
10 recognize that you occupy it, you have been occupying
11 it for an unknown period of time we will, therefore,
12 negotiate lands claims with you.

13 An archaeologist might come forward and
14 say: Well 8,000 years ago it was a different Inuit
15 group but does that not mean that we would say that the
16 Inuit in the eastern Arctic are not the people who have
17 been occupying since time immemorial.

18 Q. Would that be the case with the
19 Tobaccos in southern Ontario who have been -- what
20 happened to the Tobacco tribes?

21 A. As a distinct nation they
22 disappeared.

23 Q. Why?

24 A. In part through conflict with other
25 Indian nations and in part through absorption into the

1 more powerful nations in that territory.

2 Q. Okay. What's your opinion on nations
3 that have disappeared in that manner?

4 A. Well, if the nations such as the
5 Tobaccos disappeared well in advance of Crown interest
6 or attempts to exert sovereignty over the territory,
7 then it's not relevant.

8 I think the Canadian courts, the degree
9 to which they've given us any indication as to what
10 they really mean by time immemorial have indicated to
11 us that what counts is when the Crown asserts
12 sovereignty in the territory or when it, in fact,
13 attempts to settle the territory and if events, if
14 other groups had occupied it hundreds of years ago and
15 they have disappeared or they simply have moved
16 westward, eastward, some direction, that's not
17 relevant, what counts is who's there at the time the
18 Crown wishes to acquire the land and has that group
19 been there, did they just arrive last week or have they
20 been there for some indefinite period of time.

21 Q. Okay. I Want to move on a bit --

22 MADAM CHAIR: Excuse me, Mr. Irwin.

23 MR. IRWIN: Yes.

24 MADAM CHAIR: Before we start, we
25 normally set a schedule for when we want to take breaks

1 and I know you're anxious to complete Professor Morse.

2 MR. IRWIN: I'm anxious to take a break.

3 MADAM CHAIR: But we normally have a
4 20-minute break, and if this is a good time for a
5 break--

6 MR. IRWIN: This might be a good time.

7 MADAM CHAIR: --then we can do that.

8 And, again, perhaps we will canvass
9 counsel and see how long we might be in
10 cross-examination and that will give us some sense
11 whether we'll be finished at 5:00 or a little later.

12 How long do you expect to take in your
13 examination-in-chief?

14 MR. IRWIN: I quite frankly thought I
15 would be finished with Professor Morse by now when I
16 left Sault Ste. Marie.

17 I see I'm on page 4 of 29 pages. It's
18 just so relevant and so interesting I thought we would
19 amplify on that. I've used that word three times,
20 which is twice too many.

21 MADAM CHAIR: Well, you might want to
22 discuss with Professor Morse over the break how to
23 expedite various points in his evidence.

24 MR. IRWIN: Okay.

25 MADAM CHAIR: Mr. Freidin, how long will

1 you take in cross-examination?

2 MR. FREIDIN: Well, Madam Chair, other
3 than asking Mr. Morse how many classes he had to
4 cancel to get here because of his busy schedule writing
5 books and articles, I don't intend to ask any questions
6 at the present time.

7 MADAM CHAIR: Thank you. Mr. Hunt?

8 MR. HUNT: Half an hour.

9 MADAM CHAIR: Half an hour.

10 Ms. Gillespie?

11 MS. GILLESPIE: Madam Chair, we are
12 reserving any response to legal argument, so we will
13 not have any cross-examination.

14 MADAM CHAIR: All right.

15 MR. FREIDIN: Madam Chair, perhaps I
16 should just indicate that the position of the proponent
17 is the same as the Ministry of the Environment. I
18 think we indicated in the scoping session and in our
19 statement of issues that we feel that the time that we
20 will respond to the evidence of Professor Morse will be
21 through legal argument.

22 MADAM CHAIR: Yes. Thank you, Mr.
23 Freidin.

24 Well, we're certainly prepared to
25 complete Professor Morse's evidence today, Mr. Irwin,

1 and the Board will accommodate sitting until that's
2 done.

3 So why don't we take a 20-minute break at
4 this point, and I think for our court reporters we
5 should break every hour and 20 minutes or so. All
6 right.

7 MR. IRWIN: Thank you.

8 MADAM CHAIR: Thank you.

9 ---Recess taken at 2:45 p.m.

10 ---On resuming at 3:10 p.m.

11 MADAM CHAIR: Please continue, Mr. Irwin.

12 MR. IRWIN: Thank you, Madam Chair, Mr.
13 Martel.

14 Madam Chair, I'm at a loss these days.

15 Q. Professor Morse, now you deal with
16 the Shaw Milling case -- the St. Catharines Milling,
17 but I want to do a reversal on that, on the difficulty
18 of natives getting to courts, and in here you say:

19 "In 1951 it was illegal for natives to
20 bring court actions."

21 I would like some history of that.

22 A. Well, the general proposition I guess
23 I was trying to bring to the attention of the panel is
24 that the involvement of aboriginal people as willing
25 litigants, as Plaintiffs coming before Canadian courts

1 is really of very recent vintage, it really traces -- I
2 guess the first example of it is the Calder case which
3 went to a judgment at trial in the B.C. Supreme Court,
4 was about 1969.

5 One of the reasons for this that I have
6 just referred to is that for a period of time, my
7 recollection I think is from 1932 to 1951, the Indian
8 Act made it an offence for Indian people to bring a
9 case against the Crown, in effect bringing a land claim
10 case, complaints against the Crown before Canadian
11 courts. It was also illegal for Indian people to raise
12 money for these types of cases and, furthermore, it was
13 illegal for Canadian lawyers to accept money from
14 Indian people to bring such cases. So for a period of
15 time it was simply illegal for these cases to go
16 forward.

17 But even prior to that time we find that
18 aboriginal people with few exceptions were not parties
19 to court cases. So our law, if you will --

20 Q. Just stop there. Now, you mentioned
21 that they couldn't even leave the reserves without
22 consent.

23 A. Well, one of the other practical
24 difficulties, as I've just indicated, the Indian Act
25 for a period of time made it a crime to bring these

-1 cases, but there were practical difficulties in the way -
2 of Indian people in particular of bringing cases.

3 One practical difficulty is that their
4 collective assets, their Indian monies, were held by
5 the Crown as trustee on their behalf, so that you had
6 to get the Crown to release the money to bring the case
7 against the Crown and the Crown seemed to be, perhaps
8 not surprisingly, reluctant to do so. So that getting
9 access to what was their own money was, for practical
10 and bureaucratic reasons, an impossibility.

11 A further factor is that starting in the
12 1880s in the Prairies and continuing for some time
13 thereafter Indian people were not entitled to leave
14 their reserve unless they obtained a permit or a pass
15 from the resident Indian agent. So that meant you had
16 to advise the Indian agent what was the purpose for
17 your business off the reserve.

18 And again the practical difficulty would
19 be is if you said to the Indian agent, I guess: Well,
20 I want to go and consult with my lawyer to bring a
21 lawsuit against you and your government department, the
22 Indian agent may not be forthcoming with such a pass.

23 So the difficulties in just raising the
24 money and in getting access to lawyers and, of course,
25 as well, most Indian reserves, in particular in rural

1 remote areas, and lawyers have tended to be in cities
2 until more recent years when the legal profession has
3 spread a bit outward.

4 So just for the practical, logistical
5 reasons it was difficult for aboriginal people to
6 litigate these issues.

7 Q. Now, you talk about the St.
8 Catharines Milling case, that would be in 1888, that
9 would be about the time of the Riel Uprising. What was
10 the atmosphere occurring in Ontario at the time of that
11 case; briefly what was it about, and what was at risk
12 and were the natives ever a party to it?

13 A. Well, that's a fascinating very
14 important case, the St. Catharines Milling case really
15 set the Canadian law from the time it was released
16 until the Supreme of Canada decision in Calder in 1973.
17 So for about 85 years, I guess, it really ruled the
18 Canadian law.

19 The case itself stems from a
20 federal/provincial dispute. At this time, in the 18 --
21 starting in the 1870s, the government in Toronto and
22 the government in Ottawa were disputing really what was
23 the size of Ontario.

24 Q. Is that the same party, or different
25 parties?

1 A. Well, the government in Toronto
2 was -- the Government of Ontario was the Liberal party
3 and the government in Ottawa was the Conservative
4 party. There were certain party aspects to this as
5 well, just some personal aspects. The Premier of
6 Ontario and Prime Minister of Canada at the time were
7 not the best of friends.

8 The dispute -- or one aspect of the
9 dispute was simply how big Ontario was and, needless to
10 say, the Government of Ontario took the view that it
11 was larger than the Government of Canada did.

12 This dispute over the western boundary of
13 Ontario, between Ontario and Manitoba, dragged on for
14 some time. It ultimately was decided by an arbitration
15 board and that decision was upheld by the Privy
16 Council.

17 The federal government then disputed with
18 Ontario who really had control over the natural
19 resources, and the reason why the case is called St.
20 Catharines Milling is because they were the lumber
21 company, they had received a licence from the
22 Government of Canada to log and the Government of
23 Canada took the view that it had the authority to issue
24 the licences, it did, St. Catharines Milling got the
25 licence, it cut trees.

1 The Government of Ontario sued St.
2 Catharines Milling and Lumber Company on the basis that
3 they were unlawfully cutting these trees that were
4 owned by the province because they did not have a
5 provincial licence. So they sought an order
6 prohibiting St. Catharines Milling from continuing to
7 cut and they sought damages to reimburse the province
8 for the loss of the trees.

9 The federal government was brought in as
10 a co-party by St. Catharines Milling since the federal
11 government was the one that had given it the licence.
12 Since the federal government had lost the battle as to
13 where the boundary was, setting what's now the current
14 boundary between Ontario and Manitoba farther west than
15 the Government of Canada wanted, the federal
16 government's next argument was that they had acquired
17 title to the territory from the Ojibway under Treaty
18 No. 3.

19 The federal government argued since they
20 had acquired aboriginal title they had now fee simple
21 ownership, so the federal government had beneficial
22 ownership of the land.

23 To make that argument they had to argue
24 that Indian title was fee simple title. The Treaty
25 says the Ojibway are aceding, yielding, surrendering

1 their land to the Crown in Right of Canada since it's
2 the federal Crown that signed the Treaty of 1873 with
3 the Ojibway.

4 The Province of Ontario argued
5 differently. They relied upon Section 109 of the
6 Constitution Act, 1867 to say that they had ownership
7 overall lands within the province. They further argued
8 that the nature of aboriginal title was not fee simple
9 title, it was instead merely a burden or a lesser
10 interest that was a burden on the underlying Crown
11 title. By virtue of Section 109 of the Constitution
12 Act the province said we have, the province, has the
13 underlying Crown title, the Indian title is merely a
14 burden. When the Ojibway surrendered that Indian title
15 to the Government of Canada, it evaporates, it
16 disappears.

17 So the burden on the underlying or
18 radical provincial Crown title is lifted, it is now
19 perfected and complete free of this burden. The
20 federal government, although it has a Treaty saying
21 it's acquiring this land, in fact, is acquiring
22 nothing, it is really just eliminating this Indian
23 title as a burden on the provincial title, therefore,
24 the province says: The federal government has nothing,
25 it is not a landowner, and its also does not have

1 constitutional jurisdiction over trees within what's
2 now defined as Ontario; therefore, the federal
3 government could not give a good licence, therefore,
4 St. Catharines Milling did not have a licence and it
5 was unlawfully cutting the trees.

6 Okay. Now, that -- just to come to your
7 Riel Rebellion very quickly, this matter went to trial
8 before Chancellor Boyd in Toronto in 1885, the very
9 week that the troops board the trains to go westward to
10 put down the Riel Rebellion.

11 Q. Now, a decision was reached by that
12 court without any native participation either as
13 advocates, as parties, or they weren't involved; is
14 that correct?

15 A. As the dispute ends up in practical
16 terms really being solely between the Government of
17 Canada, the Government of Ontario, St. Catharines
18 Milling is kind of a bystander to this caught up in the
19 crossfire but is a party, the Ojibway are not a party
20 at all.

21 All of the arguments, therefore, about
22 what is the nature of aboriginal title or Indian title,
23 what was the significance of the Treaty, what did the
24 Ojibway have, what did they give up, what did they
25 still have, what was their interest in these matters

1 was never heard by the courts, it was simply the
2 federal government and provincial government making
3 arguments that suited their own constitutional and
4 political purposes.

5 Q. Can you conceive of this occurring
6 today, aboriginal title, an important decision of that
7 nature occurring without natives being involved as
8 parties or added parties or --

9 A. I think that it's unlikely today that
10 such a case would go forward, at least without
11 aboriginal people seeking to intervene, but we do in
12 fact still have cases today where aboriginal issues are
13 raised in a federal/provincial conflict situation, such
14 as in the Rafferty Alameda Dam case; aboriginal issues
15 may get raised but they may not be parties.

16 However, clearly in cases that directly
17 affect aboriginal interests, aboriginal people will
18 insist, they'll come forward to be parties and the
19 courts have been quite willing to grant them intervenor
20 status when they've sought it.

21 Q. Okay. Now, I'm going to jump ahead
22 to 1973 and the Calder decision which you've indicated
23 is a very important decision. Why is it important?

24 A. Well, the St. Catharines Milling
25 case, as I indicate, basically was seen as the leading

1 decision in the law in this area.

2 The St. Catharines Milling decision does
3 recognize aboriginal title, it does say that it exists,
4 but it defined it in a rather limited way and also
5 regarded it, the content of aboriginal title, in
6 limited terms and indicated that it was a matter that
7 was dependent upon the good will and pleasure of the
8 sovereign.

9 Subsequent to that decision, again since
10 aboriginal people were not going to court or were
11 unable to go to court to defend their rights, we have a
12 practice developing between federal and provincial
13 governments and that practice is one in which
14 aboriginal interests and aboriginal treaty rights are
15 largely ignored, they are put to the side.

16 So at a practical level, even though the
17 St. Catharines Milling case gave some legal recognition
18 of aboriginal title, it was not having any
19 significance.

20 As Mr. Martel raised the question
21 earlier: Well, what about British Columbia, why are
22 there no trees there? Well, that in fact is an example
23 of how although the law said aboriginal title existed
24 the governments of Canada and British Columbia just did
25 not come to grips with the issue, and aboriginal people

1 were not litigating, so they were not forcing the
2 issue. So at a practical level it seemed as if
3 - aboriginal rights were something of the past they were
4 no longer relevant.

5 The Calder case comes along and makes it
6 very clear even within a split decision, that
7 aboriginal title is very much alive and meaningful.
8 The court is split on the merits of the case evenly,
9 three and three, but they split over the question of
10 whether or not the Nis'sga Nation still had aboriginal
11 title in 1973.

12 The six judges involved -- the judgments
13 of Mr. Justice Hall and Mr. Justice Judson agree,
14 however, on one essential element, which is, that
15 aboriginal title is part of the common law.

16 So they made it clear that this
17 government practice that developed was in fact
18 misguided. That aboriginal title was part of the law.
19 The debate would be in any specific instance whether or
20 not a particular aboriginal group could still assert
21 aboriginal title or not, and on the facts their
22 interpretation of some colonial legislation, the judges
23 disagreed and the seventh judge dealt with it on a
24 matter of procedure. He dismissed the case because the
25 Nis'sga had not obtained a fiat or the permission of

1 the province to sue the province. But the effect of
2 this was quite striking, both politically legally.

3 The Prime Minister of Canada had gone to
4 Vancouver two years before the Supreme Court of Canada
5 decision, but after the lower courts in B.C. had
6 rejected the Nis'sga argument and Prime Minister
7 Trudeau indicated in a major speech that aboriginal
8 title and aboriginal rights were a thing of the past.
9 That this was not part of current reality. That it was
10 in his view inappropriate for two groups of Canadians
11 to be negotiating treaties with each other.

12 While the treaties clearly had to be
13 honored, the Crown's prestige and commitment was at
14 stake. People who had never had treaties simply that
15 was life, this was an historic fact. It may have been
16 unfortunate, but nevertheless it was the reality and
17 that would be the end of the matter.

18 With the decision coming down from the
19 Supreme Court of Canada, in six judges saying
20 aboriginal title was still part of the law, the
21 Government of Canada had to reverse its position and a
22 new policy was articulated in mid August of 1973 by the
23 then Minister of Indian Affairs, Jean Chretien, saying
24 that the federal government now would accept that
25 aboriginal title existed, that aboriginal people in

1 non-treaty areas might still have this title, and
2 furthermore, that the Government of Canada was
3- committed to negotiating land claims agreements or
4 treaties, settlements of this aboriginal title with
5 aboriginal people in British Columbia, in the Yukon,
6 the Northwest Territories and Quebec, was the initial
7 scope of that policy statement.

8 So that's the political reality. The
9 practical consequences of that, of course, has been
10 that we now have land claims agreements such as the
11 James Bay and Northern Quebec agreement negotiated two
12 years after this new announcement.

13 We have the Northeastern Quebec agreement
14 in 1978, the Inuvialuit agreement in the western Arctic
15 in 1984 and almost a final agreement in the Yukon and
16 the eastern Arctic.

17 Negotiations are underway in parts of the
18 McKenzie Valley area in the Northwest Territories, in
19 Labrador, throughout British Columbia now and in
20 north -- well, I guess central eastern Quebec with the
21 Attikamek Montagnais.

22 So all of these land claims negotiations
23 or agreements emanate from the change in federal policy
24 which is a direct result of Calder case.

25 Furthermore, as a matter of law, the

1 Calder case has really set the law more or less on its
2 head back to where it once was, much closer to the law
3 as it has existed in the United States from the
4 colonial era onward, and opened a new era in
5 litigation. Indian people now start coming to court
6 more often because they felt there was some prospect of
7 success, and in fact the content of the law has changed
8 dramatically since that decision. So that was really
9 kind of the watershed. Since then things have moved
10 forward quite dramatically.

11 Q. You have an hiatus period between '73
12 and '82, the Constitution of '82, Constitutional
13 Amendment of '82. You have the Calder case decision,
14 you have the federal government reversing its policy
15 and policy statements being issued from the then
16 Minister, Jean Chretien.

17 How would you assess this period between
18 '73 and '82? What type of activity was taking place?

19 Q. Well, as I have just mentioned, in
20 some parts of the country the land claims negotiations
21 were actively underway, occasionally spurred by
22 litigation such as the interlocutory injunction action
23 of the Cree in Quebec. The action of the Dene in the
24 Northwest Territories, et cetera.

25 It was an era in which there was an

1 explosion of litigation regarding aboriginal and treaty
2 rights particularly in the context of hunting and
3 fishing cases.

4 Aboriginal people had been starting to
5 get charged with some regularity by provincial
6 conservation officers in particular, and some federal
7 officers starting in the 1950's, but when we hit the
8 1970's we see now with great regularity that aboriginal
9 people are defending themselves in these actions rather
10 than just pleading guilty before a Justice of the
11 Peace, and defending themselves based on arguments
12 derived from an assertion that they have an aboriginal
13 right to do what they're doing, or they have a treaty
14 right to do what they're doing. So there are a number
15 of these cases that are going on.

16 What I have attempted to do in this
17 witness statement is to summarize the body of law
18 before 1982 as succinctly as I can, and what the
19 results of that demonstrates to us is that the law
20 broke down into a couple of basic categories.

21 The courts were saying while they
22 recognized aboriginal rights, they also recognized the
23 right of the Government of Canada or the government of
24 a province to pass general legislation in relation to
25 hunting and fishing, and that general legislation would

1 override aboriginal rights.

2 Q. I want to stop right there and not
3 leave the impression that that is the law today. This
4 has been significantly changed in the last six years.

5 A. Yes.

6 Q. But that was the judicial
7 interpretation at the time?

8 A. That was the thrust of the case law.
9 There were some subtleties to this, a few decisions to
10 the contrary, but the leading decisions from the
11 Supreme Court of Canada were quite clear that even with
12 some regret expressed by the court from time to time,
13 nevertheless they took the view that both federal and
14 provincial governments were authorized to enact laws in
15 these areas, and when they had duly enacted a law that
16 was constitutional within the context of normal federal
17 provincial relations, that law could apply to
18 aboriginal people equally as it applied to
19 non-aboriginal people.

20 Now if there was a provision in that law
21 which itself extended some rights to aboriginal people
22 then of course they would possess those rights. But
23 absent such an express extension of rights the
24 legislation would prevail over aboriginal rights.

25 The situation was different, however,

1 when it came to treaty rights, particular relevance to
2 Ontario. Here the law broke down as to whether or not
3 the legislation in conflict with treaty rights was
4 federal legislation or if it was provincial
5 legislation.

6 The court said federal legislation could
7 also override treaty rights just like it could override
8 aboriginal rights, but provincial legislation was
9 treated differently. Provincial legislation was viewed
10 as being subordinate to treaty rights.

11 So that as a general principle, if a
12 person had a treaty right to, let's say, hunt or fish
13 on unoccupied Crown land, then a provincial statute
14 which said you could only do that during certain times
15 of the year, or you could only take so many moose, or
16 with a particular method, would be not ultra vires, not
17 struck down, but simply inapplicable to that person
18 with that treaty right.

19 There are a couple of minor exceptions to
20 this, such as provincial law dealing with safety. So,
21 for example, perusing the Game and Fish Act, it says
22 that you cannot hunt or shoot a rifle within so many
23 feet of a highway would still apply because that's a
24 matter of benefiting everyone through public safety, or
25 if the law declared a particular piece of land, closed

1 land for everyone at all times throughout the year, a
2 wildlife sanctuary. But if the law allowed hunters,
3 licenced hunters to hunt in that land for even just one
4 day a year then that meant aboriginal people with the
5 treaty right could hunt there 365 days a year. It was
6 only if it was completely closed as a matter of
7 essential preservation of wildlife.

8 Q. So you have this type of debate and
9 this kind of interpretation going on prior to '82 and I
10 want to get to the '82 --

11 MR. MARTEL: Can I ask just a question at
12 that point for clarification. Just to get your
13 understanding.

14 The thing that's -- is not understood
15 yet, at least not by me, is the right to take more than
16 is required for your own personal use. In other words,
17 if native people could hunt at one time to make a
18 livelihood, not just feed their family. I mean it
19 hinges -- I think some of it hinges on that particular
20 area. Are you saying that natives have the right to
21 hunt beyond supplying their own immediate need and that
22 applies to fishing, hunting, trapping, and I guess
23 ultimately somewhere along the line in cutting trees
24 even, and of course I think there's a serious division
25 there on what Indian rights are, as perceived by the

1 white community.

2 Will you give me your --

3 THE WITNESS: I will try to give you a
4 succinct answer on that, but you will have to bear with
5 me a little bit.

6 The first thing is it depends upon the
7 source of the right. Is it a treaty right or an
8 aboriginal right. If it's a treaty right then the
9 first step is to turn to specific treaty such as the
10 Robinson Superior Treaty of 1850 and look at the
11 treaty, its written words, and the oral negotiations,
12 the oral promises, and look at this entire treaty
13 record and say well, is there in this treaty
14 confirmation of a commercial right to hunt or fish or a
15 right to hunt and fish beyond personal needs for
16 programs, religious purposes, social purposes, extended
17 family needs. What is the content of right that's
18 contained in the treaty?

19 That means, of course, that the rights
20 will vary from one treaty to another. So that some
21 treaties have been interpreted by the courts as
22 containing commercial rights, some other treaties have
23 been interpreted not containing those rights.

24 If the source of the right alleged is an
25 aboriginal right then again we have somewhat of a

1 - laborious process of examining the situation and saying
2 well, did this aboriginal group exercise a commercial
3 right to fish? Did it fish for trade with other Indian
4 nations or even with non-aboriginal people moving into
5 the area at the time. If they did then their
6 aboriginal rights that flow from their interest in the
7 land would include this broader right to fish or hunt
8 more than merely for personal food.

9 If it did not, then one would conclude
10 that for that group they do not have a commercial
11 harvesting right of fish or game or logging trees or
12 the like. So it ends up being either treaty specific
13 or group specific. In either case we look to see what
14 really was the term of the treaty or what was the
15 reality of the aboriginal use of land at the time.

16 Prior to 1982, the courts were reasonably
17 consistent in saying when it came to commercial
18 activities federal or provincial legislation was
19 sufficient to override aboriginal rights or treaty
20 rights.

21 Since 1982, the courts have adopted
22 somewhat of a different approach and we now see coming
23 from the courts directions that -- well, in fact have
24 evolved since 1982. For example, the Ontario Court of
25 Appeal, in a decision called Agawa, A-g-a-w-a,

1 concluded that that treaty in Ontario did include a
2 commercial right to fish, but nevertheless the fishing
3 law could validly impose restrictions on that
4 commercial right.

5 The leading decision in the area overall
6 now is the Sparrow case from the Supreme Court of
7 Canada. The court there made clear that it was not
8 dealing with commercial uses because it was not raised
9 at trial, although there's some suggestion that that
10 was what was occurring, that was not the gist of the
11 charges.

12 The Supreme Court of Canada in Sparrow
13 defined the right, the non-commercial right in terms
14 broader than you had suggested. That is, they said
15 this aboriginal right for the particular people
16 involved there - it's a Musquem First Nation, part of
17 the Coastal Salish, S-a-l-i-s-h people of the lower
18 mainland in southern Vancouver Island, British
19 Columbia - for those people their non-commercial right
20 included the right to fish for themselves, for their
21 extended families, for social purposes, feasts and
22 ceremonial purposes. So it therefore means something
23 more than personal immediate nuclear family
24 consumption. The court did not reject there being a
25 commercial right. They just said this is not before

1 us.

2 The implications from this are obviously
3 wide open now to interpretation. It is being suggested
4 in some quarters that the test outlined by the Supreme
5 Court in Sparrow, and I guess we'll probably come to
6 that in a couple minutes, that test will equally apply
7 to commercial fishing and likewise would apply in other
8 contexts to commercial hunting or other activities such
9 as logging trees, if you could prove that there was
10 that aboriginal right in the first place, or that
11 treaty right in the first place.

12 And that was the succinct version. I'm
13 sorry to drag on, but as you can see from this there's
14 not a nice neat answer to apply across the country.
15 It's going to vary. Not only from -- not particularly
16 from province to province, but even within Ontario,
17 vary from treaty area to treaty area.

18 We may find that the Ojibway and treaty
19 do not -- let's say, for example, do not have a
20 commercial right to fish, but they do to gather wild
21 rice while the Ojibway in Robinson Superior do have a
22 treaty right to commercial fish. So it may just vary
23 from place to place in that regard.

24 Q. Okay.

25 A. Part of the complexity of the law in

1 its current situation.

2 Q. Professor Morse, we now are getting
3 to really the heart of your paper, the Constitution of
4 '82, Section 25, Section 35, the '83 Constitutional
5 Amendment Proclamation, the Sparrow Decision and the
6 Guerin Decision, both of the Supreme Court of Canada.

7 Now, we'll deal first with the
8 Constitution of '82 and, specifically, Sections 25 and
9 35. How did these sections come about?

10 A. Well, in part because of the
11 unsatisfactory nature of the law from the perspective
12 of Indians, Inuit and Metis peoples. They were not
13 content with the legal situation I've outlined prior to
14 1982.

15 Their aboriginal rights were being
16 overridden by federal and provincial law, their treaty
17 rights were being overridden by federal law, that the
18 federal government, in some instances, was making
19 promises by treaty that federal law already
20 contradicted, so that the aboriginal people were very
21 dissatisfied with the state of the law. The law, in
22 effect, did not give full force to the exercise of
23 aboriginal rights.

24 Q. Okay. Now, without driving us off in
25 your mind, would you say it's a fair estimate that one

1 third of the native populations live on reserves and
2 two thirds live off reserves in our country?

3 A. Yes, I would say that that's a fair
4 rough estimate of aboriginal people overall.

5 So that you have -- and about half of
6 aboriginal people are connected to treaty, about half
7 are not. So aboriginal people were not happy with the
8 way in which aboriginal and treaty rights were being
9 treated in terms of hunting and fishing; they were not
10 happy with the limited authority that they had under
11 the Indian Act on reserve.

12 The off-reserve Indian and Metis people
13 had no legislative regime to recognize any rights of
14 governmental authority at all, the same was true for
15 the Inuit. Land claims negotiations were going nowhere
16 in British Columbia, southern Quebec, Atlantic Canada
17 at the time.

18 So on the basis of concerns over land
19 rights and aboriginal and treaty rights, aboriginal
20 people saw the constitutional renewal process that was
21 initiated by Prime Minister Trudeau for entirely other
22 reasons as a perfect opportunity to attempt to resolve
23 some of these issues, to give proper status to
24 aboriginal and treaty rights, to give it, therefore,
25 legal weight as part of the supreme law of the land, to

1 really recognize aboriginal people as a fundamental
2 element of this country, as the real founding peoples
3 of the land.

4 Because, of course, they kept hearing
5 from government officials and politicians for many
6 years, the Constitution is the supreme law, the
7 Constitution says, you know, my federal government or
8 my provincial government can do this, or likewise
9 hearing from, for example, provincial politicians
10 saying that the Constitution says only the federal
11 government can do that, I'd like to help you but I
12 can't, or the federal government doing the same and
13 saying: Only the provincial government can do it.

14 So aboriginal people get caught in this
15 kind of federal/provincial bashing or
16 federal/provincial buck passing and they kept hearing
17 Constitution, Constitution, Constitution.

18 They says: Well, okay, right, if the
19 Constitution is what you say is the supreme law of the
20 land, then that's the place where we should be, that's
21 where our aboriginal and treaty rights should be,
22 that's where our vital role in Canada should be.

23 So they went forth, they formed a united
24 front among all of the national aboriginal
25 organizations and went in with a common position of

1 what they were looking for in a new Canadian
2 Constitution.

3 The initial federal proposals said
4 nothing for aboriginal people. As aboriginal pressure
5 mounted the federal proposals then were changed to
6 refer to aboriginal peoples, but within a section
7 within the Charter of Right and Freedoms that just
8 guaranteed that whatever their rights were, aboriginal
9 and treaty rights were, it would not be diminished by
10 the Charter.

11 That arguments by, for example,
12 non-aboriginal people that aboriginal rights were
13 racially discriminatory against them would not go forth
14 with the support of the Charter because of this shield
15 or protective clause, but aboriginal people said:
16 Well, look, that doesn't advance us anywhere, all that
17 does is protect perhaps the little bit that we've got
18 from the constitutional effect.

19 Q. We are not going to acknowledge them
20 but if they are there, you know, they won't be
21 diminished?

22 A. And these, whatever it is, won't be
23 diminished. So aboriginal people kept pushing forward,
24 and what they first achieved was a provision that is
25 similar to what is now Section 35, subsection (1) of

1 the Constitution Act, 1982, at the time it was numbered
2 Section 34, and it stated that the aboriginal and
3 treaty rights of the aboriginal peoples of Canada are
4 hereby recognized and affirmed.

5 Aboriginal people also sought a second
6 clause which they thought was agreed to but did not
7 appear in the revised federal proposal, which was a
8 clause ensuring to them that they would have a veto
9 over any changes to this recognition of aboriginal and
10 treaty rights. When that second clause was not there,
11 the efforts in London, England and elsewhere to oppose
12 the Constitution continued on the parts of some people.

13 Now, another clause that was, however,
14 added quite quickly was a clause that is now subsection
15 35, subsection (2), and that is a clause that defines
16 aboriginal peoples of Canada as being the Indian, Inuit
17 and Metis peoples of Canada. And that clause is there
18 by virtue of the efforts of the Native Council of
19 Canada, in particular, a witness who will follow me in
20 the form of Mr. Harry Daniels then president of the
21 Native Council of Canada.

22 Q. Now, you've given that as if it was a
23 one-time thing, but is it not a fact that Metis was
24 missing from that clause in a lot of the drafts?

25 A. Yes, it was. Now, the position that

1 went forward from the aboriginal side, from the Native
2 Council of Canada, Assembly of First Nations,
3 Inuit out of Canada, their understanding was aboriginal
4 and treaty rights would apply to all of their peoples,
5 but there was some concern that arose within the Native
6 Council of Canada and particularly by Mr. Daniels
7 that --

8 Q. He was president at the time?

9 A. President of the Native Council of
10 Canada at the time. His concern was that perhaps in
11 the future federal or provincial governments might once
12 again ignore the Metis and this time says: Oh well,
13 aboriginal peoples, that only means Indians and Inuit,
14 does not mean the Metis. Gee, if we meant it to be the
15 Metis we would have put it in there.

16 So given that possibility, and that of
17 course has been the federal view almost uniformly since
18 1867 in its interpretation of Section 91, subsection
19 (24) where it refers to Indians and lands reserved for
20 Indians.

21 Q. When Sir John A. MacDonald referred
22 to them as the damn half-breeds?

23 A. Yes. And while in the early days the
24 federal government saw the Metis as part of that,
25 subsequent federal policy was to say: Oh no, the Metis

1 are not Indians for the purposes of Section 91(24) so
2 we have no authority.

3 The Metis have been dealing with that
4 political interpretation for decades and, however, the
5 courts had said the Inuit or Eskimo at the time, were
6 Indians as far as Section 91(24) was concerned, and the
7 Metis kept saying: Well, see the term Indians in there
8 is not just Indians under the Indian Act but it's all
9 aboriginal peoples, but the federal government
10 resisted.

11 And then when this clause came forward
12 and was agreed to, then thought: Well, gee, maybe
13 they're going to pull the same trick on us again,
14 therefore, the view is: Well, we know it - meaning the
15 aboriginal people - know it means all aboriginal
16 people, Indian, Metis and Inuit.

17 And, therefore, Mr. Daniels said: Well,
18 since we know it and the federal government at the time
19 in the form of particularly Jean Chretien the Prime
20 Minister were accepting that view politically, then the
21 question became: Well then let's -- since you agree and
22 we agree, then let's put it in the Constitution and
23 make it clear. So that clause was put in.

24 It continued in the draft up until the
25 First Ministers Conference in early November of 1991 in

1 the conference that --

2 Q. '91?

3 A. '81, I'm sorry, 1981. You know,
4 we're not even at November yet, I'm losing track of the
5 world here, at least of time.

6 In early November, 1981 where, as a
7 result of the Supreme Court of Canada decision on the
8 Constitutional reference in September of 1981, Prime
9 Minister Trudeau went back to the premiers and in a
10 conference which many Quebecois still define as the
11 night of the knives, an agreement was reached with nine
12 of the premiers and the Prime Minister to redraft the
13 federal draft constitutional amendment to make certain
14 changes, and one of those changes insisted upon,
15 apparently particularly by Alberta, was to drop this
16 section that was recognizing aboriginal and treaty
17 rights and defining aboriginal peoples as being Indian,
18 Inuit and Metis people. Likewise, sections in relation
19 to sexual equality were dropped.

20 The protest from aboriginal people was
21 swift and stunning as it was from people opposed to the
22 deletion of the sexual equality provision and the First
23 Ministers were forced to retreat somewhat and three
24 weeks later they resolved to make further changes, and
25 one of those changes was now to bring back the

1 aboriginal provisions but slightly amended, renumbered
2 as Section 35 and subsection (1) was changed now to
3 insert the word 'existing' between or in advance of
4 aboriginal and treaty rights.

5 Q. Matter of fact, going to the pre-'82
6 philosophy that's there, we won't destroy it, but we
7 don't agree it's there?

8 A. Well, there were different views as
9 to what the word 'existing' meant. Premier Lougheed
10 was of the view - and this was a view shared by
11 Sterling Lyon on at the time in Manitoba and Bill
12 Bennett in B.C. - was that the effect of this would
13 mean nothing had changed, pre-'82 situation of the law
14 as it was understood, federal/provincial law overrode
15 aboriginal rights, federal law overrode treaty rights,
16 provincial law didn't, that that was what was being
17 entrenched.

18 Now, other people interpreted it
19 differently, including some other First Ministers but,
20 nevertheless, that was the wording that was agreed to.

21 Part of the -- one aspect of this
22 rejigging of the constitutional proposal at the time as
23 well was the inclusion of a clause that compelled the
24 Prime Minister to convene a First Ministers Conference
25 within a year of the proclamation of the new part of

1 the Constitution to identify and define what aboriginal
2 and treaty rights meant, and at that conference to
3 invite representatives of the aboriginal peoples of
4 Canada.

5 That conference was held in March of
6 1983, a constitutional accord was agreed to among all
7 First Ministers with the exception of Quebec that
8 attended, and Premier Rene Levesque spoke in favour of
9 it but he would not sign since he did not recognize the
10 Constitution and that Accord contained draft amendments
11 that was to go forward and also contained a political
12 commitment to have a further First Ministers Conference
13 and set the agenda for that conference.

14 The amendments that went forward made it
15 through and very quickly, so far our only round of a
16 constitutional amendment that's worked under the many
17 forma, made it through very quickly through the
18 Province of Ontario, Canada and all the provincial
19 legislators, again with the exception of Quebec
20 although the National Assembly endorsed it.

21 The amendments were then proclaimed in
22 1984.

23 Q. Are you talking about Section 35?

24 A. Well, these amendments now include
25 what's now subsection (3) and subsection (4) of Section

1 35, they include the new section which is Section 35.1
2 and they amended Section 25.

3 The gist of these amendments -- Oh, and
4 they included what was then Section 37.1 which
5 obligated the First Ministers to have two additional
6 First Ministers Conferences.

7 The net effect being then that we had one
8 in 1983 required by the Constitution Act, 1982; one in
9 1984 required by the political agreement among the
10 First Ministers and aboriginal leaders; one in 1985,
11 and the final one in 1987. The latter two were
12 required by Section 37.1, an amendment to the
13 Constitution and that provision expired in 1987.

14 The provisions that remain within the
15 Constitution today are 35 sub (3) which indicates:

16 "For greater certain, in subsection (1)
17 "treaty rights"...", within quotes,
18 "...the term "treaty rights" includes
19 rights that now exist by way of land
20 claims agreements or may be so acquired."

21 So it makes clear that lands claims
22 agreements that have been signed that hadn't been
23 called treaties, such as the James Bay Northern Quebec
24 Agreement and any future lands claims agreements, and
25 shortly after this was proclaimed the Inuvialuit

1 Agreement, I-n-u-v-i-a-l-u-i-t, on the Western Arctic,
2 that these agreements and the rights contained in them
3 were treaty rights.

4 A similar provision of that nature was
5 added to Section 25 within the Charter to shield these
6 agreements like it was already shielding aboriginal and
7 treaty rights. Section 25 I should add also goes on to
8 deal with other rights and freedoms of the aboriginal
9 peoples.

10 Then there are two other amendments which
11 still exist, Section 35 subsection (4) which
12 guaranteed --

13 Q. That's equality --

14 A. That the sexual equality clause.

15 This provision states that:

16 "Notwithstanding any other provision, the
17 aboriginal and treaty rights that are
18 referred to are guaranteed equally to
19 male and female persons."

20 So it made it very clear, since there was
21 some concern over this, that aboriginal women and
22 aboriginal men would equally enjoy aboriginal treaty
23 rights, it was guaranteed to them, there would be no
24 distinction between them based on race -- based on sex,
25 I'm sorry.

1 And that was, again, a proposal that came
2 from the aboriginal organizations and consented by
3 everyone.

4 The final one that still remains is
5 Section 35.1 and its scope is to require the federal
6 and provincial governments to have a First Ministers
7 Conference to which aboriginal people will be invited
8 or their representatives whenever there is any proposed
9 amendment to any of these sections that referred to
10 aboriginal people.

11 So any change to Section 91, subsection
12 (24) of the Constitution Act of 1867, any change to
13 Section 25 in the Charter, any change to Section 35 or
14 to 35.1 will not take effect until there is a
15 Constitutional Conference of First Ministers and
16 aboriginal people, so there will be formal
17 consultation.

18 Q. So at this period, 82-83, you have a
19 Constitution of Canada that applies to all of the
20 federal legislations, all of the provincial
21 legislations, all the municipal councils, all of the
22 regulatory boards, it cuts across the board affirming
23 aboriginal rights and saying they apply to Inuit,
24 Indian and Metis?

25 A. And doing likewise to treaty rights.

1 Q. Yeah, right. And you have three
2 provincial conferences '83, '84, '85. Our First
3 Ministers/Aboriginal Conference, First Ministers
4 Conference '84, '85 '87.

5 Between '82 and '86 when the Guerin
6 decision came out, was not this a period of a lot of
7 discussion between scholars and advocates as to, you
8 know, what does this mean, who does it affect, whilst
9 these cases work their way up to the Supreme Court of
10 Canada.

11 And if that's the case, can you describe
12 it in your own words?

13 A. Well, there were a variety of views
14 of what - Section 35 is most generally called - what it
15 really means. There is a broad spectrum of views, and
16 what I've attempted to try and do in this witness
17 statement is to summarize that.

18 They ranged at one end from saying
19 Section 35 didn't do anything, to at the other end
20 Section 35 meant that all aboriginal and treaty rights
21 that had ever existed in Canada were now
22 constitutionally entrenched and would override any
23 federal and provincial or subordinate legislation to
24 the contrary, a broad spectrum.

25 In this period of these first few years

1 that you're discussing, while there was this spectrum
2 of views, there was some litigation. Some of these
3 cases predated the new Constitution, some of them came
4 immediately after. They're all in the train, so to
5 speak, that's left the station.

6 And we get some different views out of
7 the courts. The leading decision, I guess you could
8 say, or decisions are coming out of the Saskatchewan
9 Court of Appeal and that court took the view that
10 Section 35 really did nothing but confirm what the law
11 already was and put that in the Constitution. So no
12 practical change.

13 Q. Okay.

14 A. However, obviously aboriginal people
15 were not satisfied with that view and some provincial
16 courts were -- lowest level, were of a different view.
17 So there's a bit of controversy among the courts.

18 The Supreme Court of Canada, it starts to
19 articulate a different view of the law relating to
20 aboriginal people in a couple of cases that arose prior
21 to the Constitution, so the court does not directly
22 address the issues but is influenced by it.

23 One of these is the -- that I refer to is
24 the Nowegijick, N-o-w-e-g-i-j-i-c-k, case in which
25 Supreme Court of Canada said that the Indian Act had to

1 be given the liberal interpretation as understood by
2 the Indian people and endorsed the Ontario Court of
3 Appeal decision in a case called Regina versus Taylor
4 and Williams that defined the very broad approach to
5 interpreting treaties.

6 The Guerin case, G-u-e-r-i-n, came along
7 shortly thereafter in 1984. This case dealt with a
8 breach of trust or fiduciary obligation, a lawsuit by
9 the Musquem Band against the Department of Indian
10 Affairs in which it had administered reserve lands and
11 had leased lands to the Shaughnessy Golf & Country club
12 for 75 years, as I recall, at significantly less than
13 fair market value.

14 They won at trial and got a decision in
15 their favour for \$10-million, it was overturned by the
16 Federal Court of Appeal by a majority view. It then
17 came on before the Supreme Court of Canada.

18 The case, as I say, arose pre-1982, but
19 the court is clearly influenced by this changing
20 thinking and the court for the first time in Canadian
21 legal terms in a very clear decision, there is some
22 earlier decisions along those lines --

23 Q. I believe I said '86, it was '84?

24 A. 1984.

25 Q. Yes.

1 A. The Supreme Court declared that there
2 was a fiduciary obligation, that the government -- the
3 Crown in Right of Canada by virtue of the way in which
4 it really, the Crown, articulated aboriginal title in
5 the aboriginal/Crown relationship, the way the Crown
6 took upon itself this exclusive right to acquire Indian
7 lands and to enter into relations with aboriginal
8 people, by virtue of that, the Crown had made itself
9 into a fiduciary in a fashion similar to the way
10 executives and corporate directors can be a fiduciary,
11 in a way that bankers can be a fiduciary for their
12 clients, et cetera.

13 This meant then really for the first time
14 that there were now clear legal obligations on the
15 Crown in the way in which it dealt with the assets of
16 aboriginal people.

17 Initially the Guerin case, as I say,
18 dealt with reserve land. Subsequent decisions have
19 expanded the scope of that.

20 The Guerin case is seen, again as very
21 much a kind of watershed case, and it raises
22 expectations, and that decision has then been cited and
23 followed by a number of other cases subsequently.

24 With the failure in particular of the
25 last First Ministers Conference in 1987, there's really

1 now an explosion -- another explosion to use that
2 expression of litigation.

3 Aboriginal people turned back to the
4 courts in significant numbers, a lot of cases are
5 brought now trying and push Section 35 and the rights
6 in Section 35. The theory being, if there is no
7 constitutional process to sort out the rights of
8 aboriginal people with other Canadians through Canadian
9 governments, then not by choice, but to some degree as
10 a last resort, then the courts become the avenue to
11 address these issues.

12 And we have then a string of cases and
13 these cases basically, leading up to the Supreme Court
14 of Canada, overturn this narrow view coming out of the
15 Saskatchewan Court of Appeal, instead give us quite a
16 broad view of the import of aboriginal and treaty
17 rights, the impact of aboriginal and treaty rights on
18 federal/provincial legislation and further expand this
19 fiduciary obligation to apply to the provincial
20 government as well as the federal government and to
21 extends its application or benefit of this obligation
22 to all aboriginal people, Indian, Inuit and Metis
23 peoples, not just to First Nations in relation to
24 reserve lands.

25 So where that kind of brings us to, I

1 guess, in a sense today in light of the last few
2 decisions, like the Sparrow decision, the Sioui
3 decision.

4 Q. Before you get to Sparrow, I want to
5 deal with Mr. Justice Dickson in the Guerin because I
6 think it's important.

7 In your report you indicate that:

8 "Mr. Justice Dickson, after finding there
9 was a fiduciary relationship, also says
10 that the foundation of the
11 aboriginal/Crown relationship predates
12 Confederation and it doesn't rely on
13 the Royal Proclamation or the Indian Act
14 or any other executive order or
15 legislation, that it's...", your term was
16 "...common law...", or his term,
17 "...and sui generis interest in land."

18 What does that mean?

19 A. S-u-i, one word, g-e-n-e-r-i-s,
20 Latins expression, one of these great expressions that
21 lawyers come up with like quasi, q-u-a-s-i. We don't
22 really know what it is. Quasi is kind of like
23 something, quasi-contract or quasi-judicial, tribunal.

24 Sui generis simply means, well, it's
25 unique. Something unique, different. So we recognize

1 it in the law. We don't have an existing pigeon hole
2 to put it in so we're going to in effect create a new
3 hole, if you will, a new pigeon hole, a new space in
4 which to fit these principles and that's why Mr.
5 Justice Dickson, as he then was, in Guerin says this
6 because -- and concludes, therefore, that there's a
7 fiduciary obligation rather than a trusteeship.

8 He says this relationship is not like the
9 normal trust in private law between a trustee and a
10 beneficiary. It's not created out of some document or
11 out of discussions between the parties. It is far more
12 fundamental and historic than that. It really flows in
13 his view from the very basic nature of the aboriginal
14 Crown relationship, and as such then goes back well
15 before Confederation.

16 So in his view, therefore, that leaves us
17 with a distinct body of law with distinct obligations
18 on the Crown.

19 Q. You were just getting into the impact
20 of this decision on others when I interrupted you with
21 that. Would you please continue?

22 A. Well the Guerin case has been, I
23 think, highly influential for the kinds of points we've
24 identified.

25 The fiduciary obligation concept is one

1 that has now burst into prominence and as a result of
2 the Sparrow decision, S-p-a-r-r-o-w, it's an obligation
3 that is on the Crown in right of Canada, in the Crown
4 in right of the province. So the Ontario Government
5 has this obligation as well.

6 And since Chief Justice, then later chief
7 Justice Dickson said, since it comes from the very
8 origins of the aboriginal Crown relationship it comes
9 from a time when there is only an Imperial Crown. The
10 Imperial Crown is divided on Confederation into a
11 federal Crown and provincial Crown, but this obligation
12 is part of the unified Crown's obligation so it applies
13 to both parts of the Crown today. Direct relevance to
14 the province and of course to provincial activities,
15 agencies.

16 Furthermore the court has said in Sparrow
17 that the obligation applies to Indian Inuit and Metis
18 peoples. It applies to all aboriginal peoples.

19 The court further tells us in Guerin that
20 it's part of the common law. In Sparrow they say that
21 this common law fiduciary obligation principle has been
22 incorporated within Section 35 and particularly
23 subsection 1 of Section 35. So it is part of the
24 existing aboriginal treaty rights that are recognized
25 in a firm.

1 So while its origin is the common law,
2 the fiduciary obligation now has constitutional status,
3 and that of course has great significance on how that
4 obligation will be honoured by federal and provincial
5 governments. It impacts on its legal weight, and of
6 course impacts on how that obligation can be discharged
7 or eliminated if that's desired when its been
8 incorporated within the constitutional provision.

9 The courts have also given us an idea of
10 what this obligation means and how we should assess it.

11 It's important to look at this as part of
12 the concept of holding the Crown to a high standard of
13 honorable dealing with respect to the aboriginal
14 peoples of Canada. So there is a, if you will, a moral
15 or equitable content and context in which this
16 fiduciary obligation is to be assessed.

17 So in each particular application of the
18 alleged fiduciary obligation we ask well, has the Crown
19 lived up to this high standard? The court is at some
20 pains to make clear it is a high standard. It's not a
21 low or medium standard. It's a high standard and it's
22 tied to the very honour and prestige of the Crown.

23 But it's more than just a political stand
24 or a moral standard. It is very much a legal stand and
25 one that the courts, as they do in other areas, will

1 enforce. They will compel the Crown to adhere to that
2 high standard. The standard is trust like but not a
3 trust standard. The doctrine of fiduciary draws from
4 the trust, law of trust. It suggests this kind of high
5 standard. It suggests that the fiduciary must act only
6 in a way that is beneficial to the beneficiary of this
7 obligation. That the fiduciary cannot put himself or
8 itself in a position of conflict of interest between
9 their own interests and the interests of the
10 beneficiary. If such a conflict arises they must
11 forego their own self interest in order to advance the
12 interests of the beneficiary, in this case aboriginal
13 people. That it must deal with beneficiaries where
14 there's more than one in an even handed way.

15 That then suggests that the federal and
16 provincial governments, when dealing with matters that
17 are part of aboriginal and treaty rights, have got
18 to -- they're under an obligation to act on behalf of
19 the aboriginal group. That is to advance the interests
20 of the aboriginal group. It's not just a passive role,
21 it's an active role. They have to advance those
22 interests.

23 As well, of course, they have to respect
24 those interests as they are recognized at law.
25 Wherever they are in a position to affect the

1 aboriginal groups' rights they must do so in a way that
2 is beneficial to the group. That there cannot be
3 unfairness or injustice or immoral conduct on the part
4 of the Crown.

5 The courts have told us as well that this
6 obligation does not require, as you have indicated,
7 does not require pointing to some document. You do not
8 need an express agreement from the Crown to make it a
9 fiduciary or to govern the terms of the fiduciary
10 relationship.

11 You do not need the Royal Proclamation or
12 a treaty or statutory provision. It flows from the
13 very core of the Crown's side of the bargain of the
14 relationship that it entered into with aboriginal
15 people and this then affects really federal and
16 provincial governments in the full range, apparently
17 the full range of the way in which they exercise their
18 normal prerogatives when the exercise of those
19 prerogatives impacts upon aboriginal people and their
20 aboriginal treaty rights.

21 Q. Now on 18 and 19 you make these
22 points in six categories. In reverse order, six, you
23 try to describe the trust relationship. In five you
24 describe the high standard. In four you describe that
25 it's applicable to both federal and provincial

1 governments, and in three you've mentioned that it's
2 part of the common law. I would like to read one and
3 two into the records.

4 One, "The fiduciary obligations apply to
5 all Indians, Inuit and Metis people as opposed to only
6 Indian bands," and two, "The fiduciary obligation is
7 not limited to reserve lands or Guerin type
8 situations."

9 Can you expand on that?

10 A. Well one of the -- when the Guerin
11 decision came down one of interpretations of it,
12 particularly coming from federal government was that
13 the case should be read down to it specific facts. It
14 dealt with reserve land that had been surrendered
15 conditionally, a condition being for lease, surrendered
16 by the Musquem First Nation to the Department of Indian
17 Affairs to lease to a third party for a period of time.

18 So the federal government argued well,
19 the nature of this fiduciary obligation is really tied
20 to surrenders of interest in reserve land because
21 provisions in the Indian Act regulate this kind of
22 thing and because, in the facts of this case, the
23 federal government has something tangible. It has a
24 chunk of land and it has an expressed duty. It's
25 supposed to go out and lease it.

1 So the federal government said, well,
2 okay, the Supreme Court makes it clear. If we're in
3 that situation then we've got to get the best deal
4 possible for you and we've got to keep you informed of
5 it. We've got to give you a copy of the lease itself
6 which they refused to do for many years.

7 We have to manage this asset in a proper
8 way and perhaps that applies to the trust accounts that
9 we hold in Ottawa as well but that's all. We don't
10 have one of your tangible assets, your money or your
11 reserve lands, then we don't owe any obligation.

12 What the courts have subsequently made
13 clear is that's just dead wrong. That very narrow
14 interpretation of Guerin missed the whole thrust of the
15 case, missed the broad language used by the courts. It
16 was erroneous. That it is not limited to things
17 governed by the Indian Act. It's not limited to
18 reserves. It's not even limited to status Indians. It
19 applies to all aboriginal people in matters that affect
20 this relationship, at least where we can see the Crown
21 as having -- where there's some element of inequality
22 in the relationship or the bargaining power of the
23 party where the Crown has authority to affect the
24 people, their rights, their interests. Then in that
25 kind of context there's a fiduciary obligation.

1 Q. And you make the point in your study
2 that the courts of B.C., Ontario and Nova Scotia and
3 the Supreme Court of Canada have rejected the initial
4 narrow Saskatchewan judicial view?

5 A. That they have.

6 It's clear that the Appellate courts
7 themselves and now confirmed by the Supreme Court of
8 Canada have -- must give and have given a far broader
9 interpretation to Section 35.

10 It's significance is dramatically greater
11 than what the Saskatchewan Court of Appeal first told
12 us it was, which was by and large -- that it was
13 irrelevant. We are now in very much a new world. We
14 are seeing this occur in a variety of ways.

15 For example, the Department of Fisheries
16 and Oceans now has a new interim enforcement policy in
17 reference to the Fisheries Act and fisheries
18 regulations across the country. They're pursuing the
19 same -- developing the same in terms of their
20 administration of the Migratory Birds Convention Act.

21 The Ministry of Natural Resources of
22 Ontario has a new policy on a interim enforcement
23 policy on the Game and Fish Act in Ontario.

24 Federal and provincial governments are
25 realizing that much of the existing legislation,

1 particularly in hunting and fishing areas, is invalid
2 or is valid in reference to non-aboriginal people
3 generally, but inapplicable to aboriginal people and
4 that on an interim basis, until new regulations or a
5 new regime is structured then they have issued these
6 temporary directives to their own officials,
7 conservation officers, as to how to administer an
8 existing federal and provincial law as it relates to
9 aboriginal people.

10 Q. Now we started --

11 MADAM CHAIR: Excuse me, Mr. Irwin. The
12 Board wishes to take a break now and when we return how
13 long do you think it will take Professor Morse to sum
14 up his ideas about the new approach of the courts and
15 then the conclusion -- the pages at the end of his
16 evidence on the application of such rights to
17 environmental assessments?

18 MR. IRWIN: We think that the Sparrow
19 decision sums up everything. It gives the mechanism
20 and the guide to this particular hearing as to how
21 these types of claims are administered and that's
22 basically the end of his evidence, the Sparrow decision
23 and the mechanics as set out in the philosophy of the
24 Sparrow decision.

25 Fifteen minutes?

1 THE WITNESS: Yes, 15 minutes max I would
2 think.

3 MADAM CHAIR: All right. That is fine.
4 Is that agreeable with you, Mr. Irwin? We will take
5 our break now?

6 MR. IRWIN: Yes.

7 MADAM CHAIR: Thank you.

8 ---Recess at 4:20 p.m.

9 ---On resuming at 4:45 p.m.

10 MADAM CHAIR: Please continue, Mr. Irwin.

11 MR. IRWIN: Thank you.

12 Q. Professor Morse, we are now at the
13 mother of all cases, Sparrow. What was Sparrow about?

14 A. Well the background to this case is
15 that Ronald Sparrow is a member of the Musqueam First
16 Nation. That is the same one that was involved in the
17 Guerin case. That's in Vancouver, adjacent to the
18 University Endowment Lands there at University of
19 British Columbia, and Mr. Sparrow was fishing and he
20 was fishing with a net that used to be okay but under
21 the B.C. Fisheries Regulations, which are passed by the
22 federal government, the net length had changed from 75
23 feet to 50 feet, as I recall, so that he was fishing,
24 therefore, with an oversized net. He argued that he
25 had an aboriginal right to fish and as such his fishing

1 and the means of his fishing was not subject to
2 regulation by federal law.

3 Reasonably extensive evidence was led in
4 the case as well to the size of the salmon run and what
5 the impact of the fishery was on the run and prior
6 fishing activities from that community.

7 The federal government argued that Mr.
8 Sparrow did not have that aboriginal right . That
9 while they accepted that the aboriginal right to fish
10 was once present they argued that it had been regulated
11 for so long under federal fisheries laws that the
12 aboriginal right itself had been extinguished and that
13 all the Indians had in British Columbia, therefore, was
14 the now regulated right, whatever that would permit
15 under the federal law, as it existed at any point in
16 time, and that the federal government was free to
17 change the terms of that law as it wished and therefore
18 change the size of permitted net.

19 Mr. Sparrow was successful before the
20 B.C. courts and that decision was upheld by the Supreme
21 Court of Canada. The Supreme Court concluded that even
22 though aboriginal rights to fish had been regulated for
23 many years, regulation was not the same thing as
24 extinguishment. That the right still existed.
25 Furthermore that the right existed not as it was

1 regulated but as a result of Section 35 it existed in
2 its original unregulated form.

3 Now the court went on to also make clear
4 that what counts is the basic nature of the right. We
5 do not freeze the method by which the right is
6 exercised at any particular point in time. So that
7 there was nothing improper with Mr. Sparrow now using
8 commercially produced nets as opposed to original cedar
9 bark -- cedar wrap nets. He was free to do that. He
10 did not have to fish from a canoe. He could use a
11 motor boat. That the technological advances could
12 benefit aboriginal people.

13 What counted, therefore, was did they
14 have the right to fish at all and how one does that can
15 evolve over time. And even though it might have been
16 restrained by federal law for many, many decades that
17 did not eliminate it, so that now it could resurface in
18 a sense, in an unregulated form.

19 The court did, however, say that this
20 aboriginal right could be legislated -- legislatively
21 interfered with. That although aboriginal rights are
22 part of the supreme law of the land it is possible in
23 particular circumstances for the relevant government,
24 federal or provincial, to still exercise its
25 constitutional authority to enact laws on a particular

1 subject matter and to apply those laws in reference to
2 aboriginal people even if it infringes or interferes
3 with their aboriginal and treaty rights.

4 The court set out what the test was. So
5 they're doing a balancing act here. Part of the reason
6 for this was apparent from the evidence, was of course
7 that the Musquem are at the mouth of the river. There
8 are many other aboriginal people up river. The salmon
9 go up river. If the Musquem people fished all of
10 salmon let's say, then other aboriginal people up river
11 would not be having the capacity to exercise their
12 aboriginal rights.

13 So that it may be appropriate in certain
14 circumstances for federal or provincial law to play
15 that balancing act to ensure that -- because again it's
16 the fiduciary for all aboriginal people. It has to act
17 in an evenhanded way between one aboriginal group and
18 another. It may be appropriate for them to legislate
19 so as to ensure that there is that balance among
20 potentially competing aboriginal users.

21 So the court set out, as I've already
22 indicated, a fairly extensive fiduciary obligation
23 doctrine and the standards involved out there and also
24 set out a test that one would go through to determine
25 if, first off, legislation violated an asserted

1 aboriginal or treaty right, and if it did violate that
2 right then whether one would run through this test to
3 determine if the legislation was proper it could stand,
4 or if it could not meet the tests then the courts would
5 rule that the legislation or regulations would not
6 apply to that particular aboriginal natural group.

7 So the court then set out the test for
8 this justificatory standard, if you will, through which
9 legislation could potentially be upheld that had been
10 shown to prima facie violate an aboriginal or treaty
11 right.

12 And the court also identified some of the
13 considerations that should be brought to bear both by
14 the courts and also by the Crown - particularly again
15 the Crown is a fiduciary - considerations that should
16 be in the mind of the Crown as it develops any such
17 legislative regime.

18 So we see a kind of a justification test
19 and then we see a collection of questions, if you will
20 or considerations that the courts have -- that the
21 Supreme Court of Canada in the Sparrow case has
22 identified as being germane to this legal analysis as
23 well as to the political process of developing these
24 laws.

25 Q. So actually you have that almost in

1 three parts. First if you can show a traditional --
2 first you must show your traditional aboriginal usage
3 and some legislative interference, the second stage you
4 look at the legislation and it can't be, as you say, in
5 the public interest type -- those blank legislations
6 has to be -- even if it interferes with aboriginal
7 rights it has to be a balanced interference and
8 thirdly, the third part is I believe you set out in
9 your middle paragraph on page 22, three parts. You
10 must look at least possible infringement, compensation
11 and consultation. Is that a fair summary?

12 A. Yes, and let me just supplement that
13 a bit on the onus of proof question.

14 It is the aboriginal party that is
15 asserting that it has an aboriginal or treaty right and
16 I should mention as well that the Sparrow case and a
17 Nova Scotia Court of Appeal decision that is cited at
18 length by the Supreme Court in Sparrow called the Denny
19 case, D-e-n-n-y, makes clear that a group could have
20 either an aboriginal or treaty right or both.

21 Whatever the right is, if it's aboriginal
22 or treaty or both it's asserted by the aboriginal
23 group. That group bears the onus of proof of showing
24 that it has such a right, and that on a prima facie
25 basis there's legislative interference with it.

1 The onus then shifts to the Crown, and
2 the court I think is at some pain to make clear that
3 there is a heavy burden on the Crown, and they say
4 well, we realize that our decision, and I quote them,
5 'may place a heavy burden on the Crown.' So this is
6 not being done lightly.

7 Nevertheless, the court makes clear that
8 the onus is on the Crown, it is a heavy burden and
9 should be a heavy burden because we are talking about
10 an argument from the Crown who is a fiduciary. That it
11 is entitled to infringe a constitutionally protected
12 right. A right protected by the supreme law of the
13 land. So the court wishes that it should be a very
14 heavy burden. So it's the Crown that has that burden
15 to justify the interference.

16 And as you indicate the court also wishes
17 to make clear that proposing standards like this is a
18 matter that is in the public interest. It is for the
19 benefit of the people of Ontario or British Columbia or
20 Canada at large, that is insufficient. That is too
21 vague. It is unworkable.

22 The Crown instead has to prove tangible
23 reasons. Even there the court says a tangible reason
24 is not just conservation of fish or trees. Rather the
25 Crown has to show that the legislation meets that

1 objective in fact not just that it is conservation
2 legislation or it's intended to conserve. Rather that
3 the terms of the statute and the administration of the
4 law does in fact meet that objective.

5 So therefore if, for example, there is a
6 large salmon fish run in a particular year, in fact,
7 then you could not rely upon a statute that imposes
8 certain standards. It's designed to protect a species
9 that they fear might be in decline if the evidence in
10 reality shows that that's not the case.

11 So you have to actually prove through
12 tangible evidence, hard evidence, that there is such an
13 objective in the legislation. Not a purpose, but it's
14 actually there in the wording and that that objective
15 fits with reality. And if you do all of that you then
16 have to still deal with the question that this
17 legislation is in keeping with the special trust or
18 fiduciary relationship and that it is the least
19 possible interference with this constitutionally
20 protected right, and that it recognizes that aboriginal
21 people do have a preferred status. They have a
22 paramount right to the right of other citizens of
23 Canada.

24 So the law must in fact recognize that.
25 So in allocating a resource such as fish, game, trees,

1 you would have to ensure that that aboriginal group is
2 getting priority in the allocation. And I think the
3 court is suggesting here, for example, if in the Fraser
4 River run the most that can be harvested in the Musquem
5 area is let's say 10,000 pounds of salmon. If the
6 Musquem people need 20,000 to meet their needs then
7 they will take that entire 10,000 pounds. No one will
8 get any other fish.

9 They have the priority to use - in terms
10 of facts of that case - to meet their needs for what
11 was defined there as being social ceremonial food
12 purposes. And if that takes the entire resource then
13 that is a result. If they do not need the entire
14 resource then they'll get first crack at it and then
15 the federal or provincial government, whichever the
16 case may be, has the authority to allocate the balance
17 of the allowable harvest to other parties in accordance
18 with whatever priority scheme they might wish to
19 establish.

20 Q. Now, at page 22 you say this, and I
21 wanted to read it into the record:

22 "Although the Sparrow case deals with a
23 status Indian who is a band member, the
24 court went to some pains to make
25 clear that the judgment was intended to

1 relate to Indians, Inuit and Metis
2 peoples."

3 Now, I think I've asked the Board to read
4 some of the next few pages at their leisure because I
5 want to get directly to the conclusions.

6 You deal with the application of
7 aboriginal rights and treaty rights to the
8 environmental assessment, you indicate that they've
9 pretty well been ignored until recently. You talk
10 about the mega projects and the mechanisms,
11 environmental impact screening and the assessment
12 mechanisms, and in your mega projects you refer to some
13 very important logging projects and the Victoria
14 Exploration, and you refer to the one Huronic case re
15 Sioui.

16 And finally at page 27, again at the
17 bottom, you take all of your opinions and relate it to
18 this particular Board. You start -- do you have your
19 report there in front of you?

20 A. Yes, I do.

21 Q. You start at approximately that point
22 or where you feel most comfortable.

23 A. Well, what I am suggesting here is
24 that all of this body of law has particular relevance
25 to environmental assessment processes in general and to

1 the work of the Environmental Assessment Board of
2 Ontario under its legislation, that the EAB in
3 addressing project proposals that may be in relation to
4 small projects, as some of their case law now suggests,
5 or large projects is in a situation in which it must
6 naturally interpret its legislation in light of the
7 jurisprudence and other relevant legislation in light
8 of the jurisprudence, and what the jurisprudence is
9 saying, I think in this context, is that proposals from
10 a particular proponent have to be examined in terms of
11 the significance that they have in relation to what are
12 now constitutionally recognized and guaranteed rights of
13 aboriginal people.

14 Neither the Constitution nor the courts
15 have given us a complete definition of what aboriginal
16 and treaty rights mean. The courts have, I believe,
17 chosen intentionally not to give an all-encompassing
18 definition, they have instead dealt with these issues
19 on a case by case basis, but at least what it means as
20 of today is that these rights, these aboriginal and
21 treaty rights can include the rights to harvest fish
22 - and game, to trap furbearing animals, to gather food,
23 medicines and plants, to harvest lumber for firewood
24 and construction, means of transportation, to mine or
25 quarry for traditional uses, to visit sacred sites to

1 maintain religious practices, to travel over the land
2 for carrying out these purposes.

3 I do not wish to suggest, therefore, to
4 be very clear that that is all that aboriginal and
5 treaty rights mean, but at the minimum that's what
6 aboriginal rights mean in terms of what the courts have
7 told us to date.

8 This list of course can be supplemented
9 by terms of any specific treaties giving additional
10 rights, and some treaties do. As well, what the courts
11 have left open is that a particular aboriginal group
12 can come forward and prove, through evidence oral
13 evidence, written historical evidence, et cetera, that
14 they have other aboriginal rights, other traditional
15 usages.

16 The exercise of these rights are clearly,
17 at least potentially, affected by specific activities
18 on the land, activities that may be -- whether that's
19 mining or hydroelectric projects or, of course,
20 logging, timber industry.

21 Where the proponents put forth a proposal
22 that does affect these rights, then I believe the
23 Environmental Assessment Board is compelled by the law
24 to examine that evidence, determine if those rights are
25 being affected, and it then has to render its decision

1 in such a way that it is interpreting and applying this
2 body of law properly in light of the law as it stands
3 today, and that means that the priority of the
4 aboriginal usage, where that's demonstrated to exist,
5 that that priority has to be respected, that the rights
6 themselves can only be interfered with in accordance
7 with the test that has been set out by the Sparrow
8 case.

9 If these rights are not being interfered
10 with by a particular project proposal, then the Board
11 can say so and then the question of dealing with these
12 rights can stop at that point.

13 But if the Board is persuaded that the
14 rights do exist and is further persuaded that the
15 rights are being interfered with in some way by the
16 specifics of the proposal, then in interpreting its
17 mandate under the Environmental Assessment Act and in
18 dealing with that proposal, it has to address its mind
19 to these rights and decide what that balance is.

20 And its decision may, of course, conclude
21 that the justification test set out in Sparrow has been
22 met in these circumstances, or it may conclude that it
23 has not been met, and if not -- if it has not been met,
24 then there are clearly consequences that follow from
25 that that would form part of the decision of the

1 Environmental Assessment Board.

2 MR. IRWIN: At that point I think I'll
3 end my examination-in-chief. Thank you, Professor
4 Morse, I found the whole thing very interesting and
5 thank you for coming.

6 THE WITNESS: My pleasure.

7 MADAM CHAIR: Thank you, Professor Morse,
8 Mr. Irwin.

9 Mr. Freidin, you won't be
10 cross-examining?

11 MR. FREIDIN: That's right.

12 MADAM CHAIR: Ms. Gillespie, you will
13 also not be cross-examining?

14 MS. GILLESPIE: That's right.

15 MADAM CHAIR: Mr. Hunt?

16 MR. HUNT: Thank you.

17 CROSS-EXAMINATION BY MR. HUNT:

18 Q. Professor, I would like to pick up
19 just where Mr. --

20 MADAM CHAIR: Excuse me, Mr. Hunt.

21 Professor Morse, are you aware of which
22 party Mr. Hunt represents?

23 THE WITNESS: I understand it's the
24 Ontario Forestry Industry Association.

25 MADAM CHAIR: That's right.

1 MR. HUNT: Q. I would like to pick up
2 where Mr. Irwin left off, if I could, because it
3 appears that this is really the critical point in your
4 evidence, insofar as the process of this Board is
5 concerned.

6 And at the bottom of page 27 - you have
7 that in front of you - you have set out what you now
8 describe to be, at a minimum, the types of rights that
9 the courts have found to exist in particular cases, and
10 you cite the Bear Island Foundation Case for that
11 proposition.

12 Indeed, in that case most of the rights
13 that you set out there were specifically found to apply
14 by the trial judge?

15 A. Yes.

16 Q. Is that right?

17 A. That's correct.

18 Q. And the Supreme Court of Canada just
19 this year released its decision in this case and upheld
20 the decision of the trial judge?

21 A. Yes, the Supreme Court of Canada, I
22 guess --

23 Q. You don't need to go into it.

24 A. About August 23rd, or so in about a
25 four-page decision upheld the finding of fact.

1 - Q. Upheld the finding of fact in this
2 trial. So the Bear Island case is perhaps an
3 interesting point of departure for us here because it
4 crystallizes; does it not, quite a number of the issues
5 that you have addressed over the course of this
6 afternoon in practical terms?

7 A. Well, I would suggest that Mr.
8 Justice Steele of the Ontario Supreme Court has given
9 the most detailed description of any Canadian judge of
10 what aboriginal rights entails.

11 Q. An exhaustive decision in the context
12 of that case?

13 A. Well, I'm not sure I would say it's
14 exhaustive. I think the courts in general have been
15 careful not to try and present an exhaustive decision
16 as an all-encompassing or exclusive list of rights.
17 Chief Justice Steele has indicated that in his view
18 that's what aboriginal rights entails.

19 The Ontario Court of Appeal sustained him
20 on the finding of fact but on different questions of
21 law, and the Supreme Court of Canada has now sustained
22 him on finding of fact, reversed him on one point of
23 law, and then said explicitly that they did not want
24 their decision to be taken as endorsing the balance of
25 the legal rulings that Mr. Justice Steele rendered.

1 Q. Oh, all right. That's a very helpful
2 overview,

3 A. That leaves his trial decision in a
4 certain vague --

5 Q. Well, let's just go back and just
6 examine that for a moment. First of all, that was a
7 trial; wasn't it?

8 A. Yes, a very long trial.

9 Q. And we will deal with that in a
10 moment. And the issue there, if I'm not mistaken, was
11 that the Bear Island Foundation claimed an interest,
12 aboriginal interest in approximately 4,000 square miles
13 of land in northern Ontario; am I right?

14 A. I'm not sure the precise amount of
15 land, but it would be something along that size in the
16 Bear Island area, northeastern Ontario and they claimed
17 an aboriginal title to that territory.

18 Q. That's right. The Attorney General
19 disagreed with that view and so there was a trial.

20 A. (nodding affirmatively)

21 Q. And you've indicated that it was a
22 lengthy trial, in fact about 120 days of evidence on
23 that precise issue, of whether or not the aboriginal
24 right existed?

25 A. Spread over several years, it was the

1 longest civil trial I believe in Canadian history at
2 that point in time.

3 Q. And some 3,000 exhibits filed?

4 A. (nodding affirmatively)

5 Q. Now, just to touch on the issues that
6 the court had to deal with in order to come to a
7 conclusion on whether or not there was any aboriginal
8 title to this land, I'll suggest to you what the issues
9 as delineated by Justice Steele were and you can tell
10 me if you agree that that covers the field.

11 But first, he had to determine what were
12 the origins of aboriginal rights with respect to a
13 particular parcel in question.

14 Secondly, he had to determine what the
15 nature of those rights were in the land claim area.

16 Third, he had to look at the evidence
17 that established entitlement to aboriginal rights in
18 the land claims area and, in addition, he had to
19 determine where, within that area, those aboriginal
20 rights could be proven to have attached.

21 Fourth, he had to decide whether there
22 was a right of the Crown to extinguish those rights by
23 legislation or treaty.

24 Fifth, he had to examine a specific
25 treaty, the Robinson/Huron Treaty of 1850 to determine

1 whether it was valid, whether it applied to the area
2 and whether by its terms it extinguished the aboriginal
3 rights.

4 Sixth, he had to determine whether the
5 rights were extinguished by legislation enacted in
6 Canada or Ontario.

7 Seventh, he had to consider the
8 constitutional validity of the legislation and the
9 treaties that may have had an effect of extinguishing
10 those rights.

11 And, finally, he had to deal with other
12 provincial statutes including the Limitations Act, as
13 well as common law bars to determine the impact on the
14 aboriginal rights.

15 Has that pretty well covered the issues
16 that faced the trial judge in determining whether or
17 not there was aboriginal title in this 4,000 square
18 mile tract?

19 A. That would -- well, that's much of
20 the thrust of it. He also has to deal -- one aspect of
21 this is whether or not in the historical evidence the
22 people, the aboriginal people represented by the Bear
23 Island Foundation, the Temiogami-Anishnabie people were
24 in fact covered by the Robinson/Huron Treaty of 1850 or
25 if they were not so covered by that treaty.

1 So in addition to looking at the content
2 of the treaty and its constitutional status, they had
3 to look at, as a matter of evidence, if it applied to
4 the Defendants to that action.

5 Q. Now, Mr. Justice Steele after hearing
6 the 120 days of evidence, he had to go through that
7 list of issues and make determinations on each one and,
8 in fact, he comes to a conclusion that there were
9 certain aboriginal rights in these lands that existed
10 at relevant dates and they included hunting animals for
11 food and clothing, and basically they included the
12 rights that you have set out conveniently at the bottom
13 of page 27.

14 Now, he did that with respect to one
15 particular piece of land and also with respect to the
16 particular individuals that inhabited that piece of
17 land.

18 And just by way of an aside, I took from
19 one of your comments made earlier this afternoon that
20 this process of determining aboriginal rights, which is
21 a laborious one I think you described it as, can differ
22 from one area to the another even in respect of
23 communities within the same nation, it all depends on
24 what the historical evidence is relating to the use in
25 that particular area.

1 A. I don't believe the courts have yet
2 distinguished community by community within a nation,
3 but very clearly it appears, I think from the case law,
4 that it can differ from nation to nation, or perhaps
5 within an overall nation between its significant
6 regional group, let's say, such as a swampy Cree versus
7 another regional group of Cree people.

8 Q. So it may depend on the size of the
9 area that's under consideration in coming to an
10 ultimate conclusion on whether there's differences as
11 between groups within the same nation.

12 A. And to some degree it may depend as
13 well on the nature of the land. Inuit living in the
14 far north, north of the tree line, would not likely be
15 able to make a convincing argument that they have the
16 right to logging trees when, in their area, there are
17 no trees. People who live a long way from the water,
18 from any body of water might not in fact have fishing
19 rights because there were no fish.

20 So that to some degree this will be a
21 function as well of just the land and the wildlife that
22 is there, the resources that was there.

23 Q. But that requires an examination of
24 oral evidence, such as it may exist, ancient documents
25 such as there may be, and indeed in the Bear Island

1 case, as we've already noted, in respect of that tract
2 of land, occupied some 120 days.

3 Now, in your paper you don't deal
4 specifically with the issue of onus of proof or burden
5 of proof, but that was an issue; was it not, that
6 confronted Justice Steele in the Bear Island case, he
7 had to determine within the context of that trial where
8 the various onuses lay and the standard of proof that
9 would have to be met in order to establish the
10 propositions that were relevant for it?

11 A. I agree, he did address those issues.
12 I think to make two additional points; one is I think
13 the question of onus of proof has now been more
14 decisively addressed by the Supreme Court of Canada in
15 the Sparrow case. In the context of reviewing that
16 case, I have addressed it and, you know, it's a
17 question both in writing and in oral.

18 Q. Of course in Sparrow they don't deal
19 with the standard of proof.

20 A. No, they do not indicate if it is
21 beyond a reasonable doubt or balance of probability or
22 some alternative standard. The assumption has been and
23 practice has been it's treated as a civil standard of
24 proof.

25 Q. The balance of probabilities?

1 A. Yes.

2 Q. Indeed that's the standard that
3 Justice Steele--

4 A. Articulates.

5 Q. --operated on in Bear Island?

6 A. Yes.

7 Q. And he used as a guide the Federal
8 Court decision in the Hamlet of Baker Lake.

9 A. Yes. But where the Supreme Court of
10 Canada I believe has changed Mr. Justice Steele's
11 statement of the law is in terms of the shift of the
12 onus.

13 The Supreme Court of Canada would agree
14 with Mr. Justice Steele in suggesting the initial onus
15 of proof is on the aboriginal group that is asserting
16 the aboriginal or treaty right, and further that
17 aboriginal group has to point to legislation that might
18 infringe or interfere with that right. The onus of
19 proof then, according to the Supreme Court, shifts to
20 the Crown to substantiate that infringement.

21 Q. And that was more specifically
22 articulated in Sparrow.

23 A. Yes.

24 Q. I think as you've pointed out.

25 A. Yes.

1 Q. The question then that is begged I
2 suppose by this is that before one gets into the
3 process articulated in Sparrow, there must be proof of
4 an aboriginal or treaty right that falls within Section
5 35 of the Constitution Act?

6 A. Well, that is the first step that the
7 Supreme Court has outlined in Sparrow. In a practical
8 manner we have to have someone assert the right
9 otherwise it's not raised; and then, secondly, that
10 that party must, on a prima facie basis, substantiate
11 that assertion.

12 Q. Well, the party must substantiate on
13 a prima facie basis the infringement of the right as
14 per Sparrow?

15 A. And demonstrate -- in effect, for the
16 onus to have shift, they have to demonstrate in their
17 evidence-in-chief that they're not just saying they
18 have a right but, in fact, they have evidence that
19 substantiates that right.

20 Q. But the question of the burden that
21 applies at the various points is not as you indicated
22 addressed specifically in Sparrow?

23 A. Only as I say to indicate the burden,
24 excuse me, lies on the aboriginal party that is
25 asserting this right to substantiate that they -- that

1 that group or individual possesses the right, indicate
2 the infringement and the onus of proof shifts to the
3 Crown henceforth.

4 Q. So with respect to Section 35, the
5 very first step is proof of an existing right, meaning
6 unextinguished?

7 A. And as the Supreme Court tells us in
8 the Sparrow case, it may be a right that has been
9 extensively regulated but still it would be existing.
10 So you're quite -- I agree with you, I'm just
11 commenting to clarify, it would have to be a right that
12 had not been extinguished, although it may have been
13 regulated.

14 Q. All right. So as a first step, no -
15 and I'm asking for your agreement or disagreement on
16 this - but as a first step, no court, board, tribunal,
17 commission must start out each and every proceeding on
18 the assumption that there needs to be demonstrated that
19 the matter before it does not affect any native rights?

20 A. Until the matter is raised by a party
21 to the proceedings, then it's not a matter that the
22 court or board or tribunal has to put it minds too.

23 It's not that in each and every break and
24 enter charge in a criminal court we have to say: Ah, is
25 there an aboriginal treaty right here, it has to first

1 be raised by one of the parties.

2 Q. And indeed in every environmental
3 assessment it wouldn't be automatically an issue?

4 A. No, not necessarily.

5 Q. All right. But as a first step there
6 has to be the assertion of the right and then, am I
7 correct, that it's your position that the court,
8 tribunal, board must then enter into the process of
9 determining whether or not that right exists, whether
10 or not it has been infringed and whether or not the
11 Sparrow test has been met to, in effect, justify the
12 infringement?

13 A. I'm not attempting to suggest that
14 the very first day that the proceeding commences that
15 this is where it must start.

16 Q. I appreciate that, I appreciate that.
17 I'm saying when it's raised --

18 A. Well, when it's -- I would suggest
19 that the board or court, before it can render judgment
20 when this issue has been raised, has to address these
21 issues, as I say, if they are raised to the board.

22 Now, the exact timing of that in the
23 process of the particular proceedings is normally still
24 within the prerogative of the judiciary or the tribunal
25 board so that they can stage that evidence as they

1 wish, but clearly the issue has been raised and it is
2 germane to that proceeding, they will need to hear
3 evidence on that to substantiate the initial assertion
4 that the right is present.

5 Q. But if you're correct, would you
6 agree with me that the proposition you've stated prior
7 to judgment or decision would require the body to go
8 through that process of determining whether or not the
9 right exists, whether or not there's been an
10 infringement and whether or not, as per the Sparrow
11 test, that infringement is a justifiable one?

12 A. Well, whether that process has to be
13 undergone is dependent in part upon whether or not we
14 already have jurisprudence or some other device such as
15 a treaty that is clearly present as applying the
16 territory. So if, for example --

17 Q. Well, the board is still going to
18 have to undertake an examination of a treaty or a claim
19 of that aboriginal right?

20 A. If the specific land that is in
21 question, let's say, using a kind of land base issue,
22 if the courts in that jurisdiction, such as the Ontario
23 Court of Appeal, has already declared that a treaty
24 right, the Robinson/Superior Treaty applies in that
25 territory and must be given due respect, then each --

1 so long as you're within that territory, then you can
2 start off saying: Well, that's been a finding of fact
3 that applies to this land, so we don't have to reargue
4 all of the historical evidence to determine if it does
5 in fact apply to this land.

6 MR. HUNT: Clearly if the issue is one
7 that's been dealt with by the court that has not been
8 in issue, but those cases aside, would you agree with
9 me that if you're correct then prior to rendering any
10 decision the body engaged in this process must make
11 those determinations?

12 That is, that there was an existing right
13 within the context of Section 35 of the Constitution
14 Act, that there is a case made out that's infringed and
15 that the Sparrow test has been considered to determine
16 whether it was justified?

17 A. If the court or tribunal wishes to
18 adhere to the tests set out by Sparrow in a logical
19 fashion then it would do so. However, as you would
20 appreciate, many times courts or tribunals kind of leap
21 to the end and if they decide that they do not have to
22 address the issues because of a decision on one of
23 those issues then they may do so.

24 To just use an example in this area, the
25 Supreme Court of Canada in the Bear Island case

1 concluded that they did not have to render judgment on
2 a whole battery of the legal arguments that had been
3 put to the court because they concluded that as a
4 matter of the factual finding by the trial judge the
5 people involved did not have any longer an aboriginal
6 right because a treaty had extinguished the right not
7 applied.

8 So the Supreme Court for that reason then
9 does not have to deal with some of these assertions.

10 Q. Isn't that precisely the issue? The
11 body of first instance had to deal with them?

12 A. In that particular indication it did.
13 If, for example, the way that legal reasoning often
14 works, if the tribunal, for example, determined there
15 was no interference with the rights then you may see
16 decisions as we do from time to time from courts and
17 tribunal saying since we have found that the rights
18 were not affected we do not need to address these
19 issues, and in fact the Canadian courts at first
20 instance and on appeal have had a particular proclivity
21 in dealing with aboriginal and treaty rights issues to
22 attempt to find those kind of escape valves, where they
23 exist, and not have to address all of the issues, even
24 where they've heard evidence on all of the issues.

25 Q. To come more directly to the point in

1 the context of this proceeding, is it your opinion that
2 this Board, in light of the position taken by OMAA,
3 must now enter into an examination of aboriginal and
4 treaty rights in the proposal area and make the kind of
5 factual findings that would be necessary to come to the
6 ultimate conclusions that you indicate are necessary?

7 A. The degree to which the Board needs
8 to put its attention to those questions is, I think, as
9 I've indicated earlier, affected by the degree to which
10 these issues have already been addressed and decided by
11 prior jurisprudence.

12 Q. But we're dealing, just so you know,
13 with a land area that - I don't have the exact size -
14 but it's pretty close to half of northern Ontario.

15 MADAM CHAIR: Close to 400,000 square
16 kilometres.

17 MR. HUNT: Q. So whatever prior
18 jurisprudence there may be I suggest is going to be of
19 limited use in resolving those questions.

20 A. Well, I would suggest that the
21 jurisprudence that exists to date indicates at least
22 over a significant portion of that, through various
23 different cases, that Ontario courts have recognized
24 that there are treaties that apply in that territory
25 and those treaties do have rights and that there are

1 people who are the beneficiaries of those rights.

2 Q. But, as you had indicated, people can
3 claim both aboriginal rights and treaty rights so that
4 it does no good to examine only one of those two
5 aspects.

6 A. Well that's a matter though that's in
7 the hands of the party that wishes to raise the rights.

8 If both are raised by the particular
9 party then one has to, as I say, look at the prior
10 jurisprudence and say well, has it addressed both sides
11 of that over the territory in question.

12 Q. So is your opinion that this Board
13 must undertake - I think the words you used were the
14 laborious process of examining the situation to
15 determine whether aboriginal rights exist throughout
16 this entire area?

17 A. Well let me make a couple of comments
18 on that. One is of course the Environmental Assessment
19 Board, in dealing with this particular matter that is
20 before it, is dealing with a massive application or
21 issue. As Madam Chair has indicated approximately
22 400,000 square kilometres.

23 If it was dealing with a particular
24 project proposal that only relates to one square
25 kilometre it's very easy to concentrate that evidence

1 on this and in the context of a specific project that
2 is going to develop that land per se.

3 As I understand it, the Board or the
4 panel here is examining the broader policy questions
5 relating to timber management. It's not looking at
6 precisely whether a licence should be issued for that
7 square kilometre over there or not.

8 So in that sense the panel is addressing
9 these issues in a larger scale. I think it would not
10 be necessary for the panel, therefore, to hear evidence
11 on substantiating or attempting to substantiate
12 aboriginal or treaty rights for every square kilometre
13 of that territory.

14 Rather the panel may, and of course it's
15 within its authority to make the decision, at least at
16 first instance, decide that it can deal with these
17 issues on a larger scale, if you will, for the
18 territory -- for large portions of that territory or
19 the territory as a whole.

20 But I would agree with you that the
21 panel, or in my view it would be an appropriate
22 decision for the panel to decide that it may wish to
23 hear some evidence to substantiate the assertion that
24 aboriginal and treaty rights do exist within that
25 territory. Again, as I say, on a large scale if you

1 will, rather than on an acre by acre basis.

2 Q. Well, I don't think anyone was
3 talking about an acre by acre basis, but let me just
4 come at it this way.

5 I'm having some difficulty reconciling
6 the position that you have given this afternoon during
7 your examination-in-chief with respect to what the
8 effect of the law that you have so aptly canvassed is
9 on this particular Board with what you are now saying,
10 that this Board can in some way discharge obligations
11 by doing anything less than what was done by Justice
12 Steele in the Bear Island case when he was dealing with
13 4,000 square miles?

14 A. Well I would suggest to you -- I mean
15 the Bear Island case, one has to remember the specifics
16 of that is the aboriginal party had filed a caveat over
17 that block of land. The land could therefore not be
18 developed by any party that asserted a right to it,
19 Crown or existing third party interest.

20 Q. That's what gave rise to the action
21 for the foundation of their claim of an aboriginal
22 title to the land.

23 A. That it was.

24 But once the province brings the action
25 to dislodge the caveat because of the - from the

1 Crown's view - the impact of that caveat affecting all
2 of the users or people with legal interest in that land
3 over the territory as a whole, and therefore the
4 parties the Crown called upon, if you will, the
5 aboriginal parties, to prove, to substantiate, that
6 they did have such a right, they cross-claimed for a
7 declaration of their right. So in seeking a
8 declaration from the court that you have a particular
9 right you need to lead evidence to prove that right.

10 Q. Well that is exactly the position
11 that one is in before this Board as you have described
12 it.

13 A. Well I confess I cannot comment on
14 what is the specific submission that OMAA will make to
15 this panel. I'm not aware of what the precise terms of
16 that will be, what its argument will be, what kind of
17 relief it is seeking.

18 I would suggest that the nature of the
19 proceeding and the nature of the relief that is being
20 sought affects the degree to which these issues have to
21 be canvassed.

22 In some cases, to give an example, for
23 matters that have gone to court on interlocutory
24 injunctions the proceedings have tended to be rather
25 short. Whereas if they're going forward at trial and a

1 declaration is being sought, a declaration of
2 ownership, for example, then the proceedings are
3 significantly longer where as well of course those
4 rights are being challenged.

5 Q. Well isn't that, as you've raised it,
6 interlocutory injunctions, isn't that precisely the
7 issue that was in front of Mr. Justice Seaton of the
8 British Columbia Court of Appeal in McMillan Bloedel
9 where he said in respect of an interlocutory
10 injunction, "I am firmly," and I'm looking at the
11 judgment which is reported at Western Weekly Reports,
12 1985, 3 Western Weekly Reports at page 584 where he
13 said:

14 "I am firmly of the view that the
15 claim to Indian title cannot be rejected
16 at this stage of the litigation. The
17 questions raised by the claim are not the
18 type of questions that should be decided
19 on an interlocutory application. A great
20 amount of factual evidence will have to
21 be heard and considered. Opinion
22 evidence of those knowledgeable in these
23 matters will have to be assembled and
24 related to the factual evidence and there
25 will have to be a meticulous study of

1 the law that must take place at a trial.

2 It cannot not be done on an interlocutory
3 application."

4 Isn't that precisely the issue that faced
5 the court there? That the kinds of issues that are
6 fundamental to the decisions that have to be made here
7 have to be dealt with in the context of a proceeding
8 that focuses specifically on them?

9 A. And what the court indicates,
10 however, it does not say therefore we will not grant
11 the injunction, the matter has to go to trial.

12 Instead what the Court of Appeal did was
13 to say, given the evidence that was submitted to it,
14 largely by way of affidavit, it was convinced that
15 there was a prima facie case that aboriginal title may
16 exist, therefore it supported issuing the interlocutory
17 injunction, preserve the status quo until a trial could
18 be held at which that more detailed evidence could be
19 presented, disputed by other parties and a trial judge
20 would, having the benefit of all of that evidence and
21 legal argument, would reach a conclusion.

22 So within the interlocutory injunction
23 proceedings itself, the court is prepared to render a
24 decision, albeit an interlocutory injunction one, based
25 on a relatively succinct presentation of the evidence.

1 So that's why I suggest, and I'm agreeing
2 with you, that the nature of the proceeding, the nature
3 of the relief will therefore influence the degree to
4 which these issues have to be canvassed. And making
5 that decision is of course in the hands of the court or
6 the tribunal to decide if in that proceeding with the
7 relief being sought from it, it needs to hear more
8 detailed evidence or not.

9 Q. I am going to suggest to you that
10 if --

11 MADAM CHAIR: Excuse me, Mr. Hunt.

12 Are you going to use up all your points
13 that you want to make in final argument today or will
14 you be moving on to some other parts of Professor
15 Morse's evidence that would edify the Board on some
16 other aspects of what he's talked about?

17 MR. HUNT: Madam Chair, I would have
18 thought that it's fairly fundamental to the Board that
19 Professor Morse has given the Board his opinion as to
20 what this Board must now do in respect of this
21 continuation of the process of considering aboriginal
22 rights, and that you may have to make a determination
23 on that.

24 The testing of the limits of that
25 opinion, I would submit, are as relevant to the

1 question that's before you as was the examination of
2 the history of the law that has been given that puts
3 other evidence into a proper context. So I don't
4 regard this as basically using up all the points that
5 might be made in argument as much as getting some
6 information from this witness that may be relevant when
7 Board comes to decide these issues.

8 MADAM CHAIR: Well the Board's only
9 point, Mr. Hunt, is that fortunately or unfortunately
10 you haven't had the three years benefit of following
11 the hearing and this issue has been one that had we not
12 been open to hearing the opinions of everyone and
13 deciding to defer some of these larger issues to the
14 end of the hearing we wouldn't have gone beyond the
15 first week of the hearing.

16 You're certainly allowed to proceed in
17 your questioning of Professor Morse, but you'll have to
18 explain clearly to the Board if you're going to
19 continue this line of questioning what you expect to
20 get out of it with respect to clarifying the Board's
21 understanding of the evidence.

22 MR. HUNT: The understanding of his
23 evidence?

24 MADAM CHAIR: Yes.

25 MR. HUNT: Well, I intend to suggest to

1 the professor that the law doesn't require this Board
2 or any other Board to enter into the kind of
3 examination that he has suggested in chief is
4 necessary. Where this Board can discharge its
5 obligations pursuant to the Act and have complete
6 regard for the issues that have been raised, in
7 particular page 27, within the context of the Act
8 itself as it now stands and the task that you have been
9 given to consider this assessment and consider whether
10 to approve the undertaking. The fact is where we are
11 going.

12 MADAM CHAIR: And how many more questions
13 do you have of Professor Morse in this vein?

14 MR. HUNT: I don't have them listed so I
15 can't give you a number, but have I gone over my time?

16 MR. MARTEL: It's not really matter of
17 time.

18 MADAM CHAIR: Well, you're getting close
19 to it.

20 MR. MARTEL: It's not really a matter of
21 time. It really is a matter of where were trying to
22 go.

23 MR. HUNT: If it's not helpful to you
24 I'll sit down now and we'll save the rest. But I was
25 under the impression, perhaps mistaken, that this was

1 rather scheduled for the evidence he has given.

2 MADAM CHAIR: Certainly, as you explain
3 the reasons for questioning Professor Morse the Board
4 finds that helpful.

5 With respect to how much more we can get
6 from Professor Morse in this vein the Board doesn't
7 know. You're free to go ahead and wait for us to see
8 whether we object to any additional questions, but if
9 you're trying to put before the Board the proposition
10 you just made then certainly we've taken that from the
11 questions you've asked so far.

12 MR. HUNT: Thank you. I'm finished.

13 MADAM CHAIR: All right. Thank you, Mr.
14 Hunt.

15 Mr. Irwin, did you want to re-examine --

16 MR. IRWIN: No.

17 MADAM CHAIR: -- Professor Morse?

18 MR. IRWIN: No, thank you.

19 MADAM CHAIR: All right. We are finished
20 then. One moment.

21 Thank you very much, Professor Morse.

22 THE WITNESS: It's been my pleasure.
23 Thank you for listening.

24 MADAM CHAIR: The Board appreciates you
25 coming to Thunder Bay and presenting us with your

1 evidence. Thank you.

2 THE WITNESS: Thank you.

3 MADAM CHAIR: Mr. Irwin, we are going to
4 get started tomorrow morning at 9:00 o'clock and we
5 will be hearing from Ms. Misek?

6 MR. IRWIN: Yes, or I have to check and
7 see if she's coming in or the panel, or the three man
8 panel. I could let the clerk of the Commission know
9 this evening or early tomorrow morning.

10 MADAM CHAIR: All right. Thank you, Mr.
11 Irwin.

12 And you might remind the Board as well if
13 Ms. Misek is appearing you will want to make this
14 document an exhibit and the Board will read this
15 document this evening.

16 You mentioned about skipping through some
17 pages of Professor Morse's evidence. We go over every
18 word of the witness statements and we had digested that
19 evidence some time ago.

20 MR. IRWIN: Amazing. It's amazing.

21 MADAM CHAIR: All right then, we will
22 adjourn for this afternoon and return at nine o'clock
23 tomorrow morning.

24 MR. IRWIN: Thank you.

25 MADAM CHAIR: Thank you.

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---Whereupon the hearing was adjourned at 5:45 p.m., to
be reconvened on Thursday, September 12th, 1991,
commencing at 9:00 a.m.

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